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No. 10-

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this case should be held pending this Court's resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), since both cases present the same issue: Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, requires proof of proximate causation as an element of a claim for damages.

2. Whether the imposition of liability under FELA and the Locomotive Inspection Act based upon exposure to any diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.

LIST OF PARTIES AND AFFILIATES

The parties to this matter are listed in the caption to the petition.

RULE 29.6 STATEMENT

Petitioner Grand Trunk Western Railroad Company (sued in this matter as Grand Trunk Western Railroad, Inc.) ("GTW") is a wholly-owned subsidiary of Grand Trunk Corporation which is a wholly-owned subsidiary of Canadian National Railway Company, a publicly traded corporation.

No publicly held company owns more than 10% of GTW's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	5
B. Factual Background	7
C. Proceedings Below	9
REASONS FOR GRANTING THE PETITION	14
I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* v. *MCBRIDE*, NO. 10-235, BECAUSE IT PRESENTS THE SAME ISSUE OF WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA	15
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS	17
CONCLUSION	21

TABLE OF CONTENTS – continued

Page

APPENDICES

APPENDIX A: *Shepard* v. *Grand Trunk W. R.R.*, No. 2010-1092 (Ohio Oct. 3, 2010) (Order Of The Supreme Court Of Ohio Denying Discretionary Jurisdiction) 1a

APPENDIX B: *Shepard* v. *Grand Trunk W. R.R.*, No. 9010-1092 (Ohio Oct. 3, 2010) (Case Announcement)..... 2a

APPENDIX C: *Shepard* v. *Grand Trunk W. R.R.*, No. 92711 (Ohio Ct. App. Apr. 29, 2010)..... 3a

APPENDIX D: *Shepard* v. *Grand Trunk W. R.R.*, No. 558055 (Cuyahoga Cnty. Ct. Com. Pl. Dec. 24, 2008) (Opinion)..... 31a

APPENDIX E: Federal Statutes 36a

APPENDIX F: Federal Regulation 38a

TABLE OF AUTHORITIES

CASES Page

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 4, 17
Consol. Rail Corp. v. *Battaglia*, No. 10-75 (U.S. filed July 13, 2010) 4
Consol. Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 5
CSX Transp., Inc. v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010) 3, 14, 21
Dixson v. *Burlington N. R.R.*, 795 F. Supp. 939 (D. Neb. 1992) 19
Kayner v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas Cnty., Neb. Mar. 2, 2006) 19
Lyng v. *Payne*, 476 U.S. 926 (1986) 17
Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 6
Norfolk S. Ry. v. *Sorrell*, 549 U.S. 158 (2007) 5, 6
Rogers v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) 3, 6
St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 6
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 4, 17, 19, 20
Urie v. *Thompson*, 337 U.S. 163 (1949) 5, 6

STATUTES AND REGULATIONS

45 U.S.C. § 51 ..... 2, 5
§ 51 *et seq.* 1
§ 53 5
49 U.S.C. § 20701 ..... 1, 2, 6, 15
49 C.F.R. § 229.43 ..... 2, 6
45 Fed. Reg. 21,092 (Mar. 31, 1980) 7, 18

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY Page

2 Kenneth C. Davis, *Administrative Law Treatise* (2d ed. 1979)..... 4, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Grand Trunk Western Railroad Company ("GTW" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio denying Petitioner's motion to enter judgment notwithstanding the verdict, or, alternatively, to grant a new trial is reproduced in the appendix to the petition ("Pet. App.") at 31a-35a. The opinion of the Court of Appeals of Ohio, Eighth Appellate District, affirming the judgment of the trial court, is reproduced at Pet. App. 3a-30a. The order of the Supreme Court of Ohio declining to review the decision of the Court of Appeals is reproduced at Pet. App. 1a-2a.

JURISDICTION

The final judgment of the Court of Appeals was announced on April 29, 2010 and entered on May 10, 2010. The Supreme Court of Ohio, with two justices dissenting, declined to review the decision of the Court of Appeals on October 13, 2010. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, are reproduced at Pet. App. 36a. Relevant portions of the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, are reproduced at Pet. App. 37a. The Railroad

Locomotive Safety Standard appearing at 49 C.F.R. § 229.43(a) is reproduced at Pet. App. 38a.

STATEMENT OF THE CASE

In this case, Respondent William Shepard obtained a judgment for $872,756 in damages under FELA, 45 U.S.C. § 51, and the LIA, 49 U.S.C. § 20701, based upon his claim that he suffered from (1) chronic obstructive pulmonary disease ("COPD") and heart problems caused by exposure to diesel exhaust, and (2) throat cancer from exposure to asbestos while employed by Petitioner. Pet. App. 4a-5a. The Ohio Court of Appeals affirmed that judgment, concluding that (1) the causation element of FELA requires only that the "'negligence played any part, even the slightest, in producing the injury'" to the plaintiff, Pet. App. 17a, and (2) exposure to diesel exhaust, at any level, violates 49 C.F.R. § 229.43, a safety regulation promulgated by the Federal Railroad Administration (FRA), *id.* at 12a-13a. This case presents two issues of recurring national importance.

I. This case presents the issue whether a plaintiff must prove that an alleged violation of FELA (or the LIA) was a proximate cause of his injuries, or whether, as the court of appeals ruled, a plaintiff must show only that an alleged violation contributed, to any degree "'however, slight,'" "'no matter how slight,'" or "'even the slightest'" to plaintiff's alleged injuries. Pet. App. 14a. Petitioner proposed that the jury be required to find "proximate cause" and objected to the trial court's instructions which allowed the jury to find causation if Petitioner's conduct "play[ed] any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Trial Transcript ("Tr.") 1282-83. The trial court rejected Petitioner's

submission and its objections to the jury charge based upon its reading of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957). See Tr. 1260.

In *CSX Transportation, Inc.* v. *McBride*, this Court recently granted certiorari to decide the same issue: "Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of proximate causation." No. 10-235 (U.S. granted Nov. 29, 2010). Because this case presents the same issue of whether FELA requires a showing of proximate causation, this Court should hold the petition in this case pending resolution of *McBride*, and then resolve Question 1 of this Petition consistent with the decision in *McBride*.

II. Separate and apart from the FELA causation issue, this Court should grant certiorari to address whether the courts below violated this Court's precedent when they did not take into account the views of the Federal Railroad Administration (FRA) – the agency that promulgated the LIA safety regulation at issue in this case – when interpreting what that safety regulation requires.

In applying 49 C.F.R. § 229.43, the FRA looks to the exposure thresholds adopted by OSHA to determine compliance with the Locomotive Inspection Act. Tr. 989, *see id.* at 1001-02. That interpretation is consistent with the language of Section 229.43(a), and therefore is subject to deference under this Court's controlling decisions. The courts below, however, disregarded the FRA's interpretation and concluded that a railroad violates 49 C.F.R. § 229.43, whenever diesel exhaust makes its way into a locomotive cab. Pet. App. 12a-13a. The failure of the court of appeals to consider the FRA's interpretation of its safety regulation is contrary to this Court's holdings that require "substantial deference to an

agency's interpretation of its own regulations" so that "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:22, at 105 (2d ed. 1979).

The erroneous ruling by the court of appeals is of surpassing importance because it imposes onerous and unwarranted burdens on railroads, subjecting them to liability without any finding that the levels of diesel exhaust or asbestos exposure exceed permissible thresholds identified by OSHA. Further, because a violation of an LIA safety regulation precludes application of comparative negligence principles, a railroad may be held liable for *all* damages suffered by a plaintiff even when, as here, the jury concluded that Respondent was overwhelmingly responsible for his medical conditions. Pet. App. 15a n.3. As a result, Petitioner was ruled liable for the entire $872,756 judgment even though the jury concluded that Respondent's negligence – smoking a pack of cigarettes each day for 45 years – made him 85% responsible for his throat cancer and 82% responsible his lung and heart ailments.

Because the decision below is irreconcilable with the standards established by this Court, certiorari should be granted on this second issue.[1]

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[1] The same issue regarding liability under the LIA predicated on a violation of 49 C.F.R. § 229.43 also is presented in *Consolidated Rail Corp.* v. *Battaglia*, No. 10-75 (U.S. filed July 13, 2010). *Battaglia* Pet'n 28-31.

A. Statutory Background

For more than a century, FELA has provided a remedy under federal law for railroad workers whose workplace injury or death was caused by the actions of a railroad. 45 U.S.C. § 51. In interpreting 45 U.S.C. § 51, a judge or jury is guided by a clear and simple rule: "Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-66 (2007); *accord Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). Thus, the elements of a common-law negligence claim apply to actions under FELA unless FELA's text explicitly rejects or obviously conflicts with the traditional common-law standard. *Sorrell*, 549 U.S. at 165-66.[2]

FELA differs from a traditional workers compensation statute in that it does not adopt no-fault liability in exchange for a cap on recoveries. Instead, FELA requires proof of railroad negligence and allows traditional tort damages. As a result, FELA plaintiffs must prove "causation, i.e., the relation of the negligence to the injury." *Id.* at 169. Shortly after FELA's enactment, this Court held that

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[2] For example, FELA expressly departed from the common law by abolishing the contributory negligence defense and instead adopting a comparative negligence regime, which was an innovation when FELA was enacted in 1908. 45 U.S.C. § 53 ("that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."). FELA also "abolished the fellow servant rule [which] prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

a plaintiff proceeding under FELA must prove that the injury flows *proximately* from the railroad's negligence. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-20 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

More than 40 years later, in *Rogers* v. *Missouri Pacific Railroad*, this Court stated that in actions under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 508. In the wake of this language from *Rogers*, lower federal and state courts have applied differing standards to the element of causation under FELA. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring).

Under the FELA, a plaintiff also may establish negligence by demonstrating that the railroad violated a safety statute, thereby making the railroad negligent *per se*. See *Urie*, 337 U.S. at 174. One such safety statute is the LIA (originally, "the Boiler Inspection Act"), which requires railroads to keep locomotives "in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1).

To implement this statutory command, the FRA promulgated 49 C.F.R. § 229.43(a), which provides:

> Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Id. FRA explained, when it adopted the current version of Section 229.43, that "it is impossible to

prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980).

As explained by Petitioner's expert, FRA intended Section 229.43 to protect employees from excessive harmful levels of diesel exhaust pursuant to OSHA regulations, not to assure perfect working conditions. Tr. 989, 1001. Specifically, Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance, explained that the FRA does not consider Section 229.43 violated where (1) there is no defect in the exhaust system and (2) the engine stacks are at the proper height even if some diesel exhaust enters the cab during normal operating procedures. *Id.* Under these circumstances, there is no violation of Section 229.43 unless the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA. *Id.* at 989, 1002, 1044.[3]

B. Factual Background

Respondent William Shepard began his employment with the Detroit & Toledo Shoreline Railroad ("DTS") in June 1950 as a "fireman" working on steam engines. Pet. App. 5a & n.1. Diesel engines soon replaced steam engines, and Respondent became an engineer on diesel engines from 1954 until his retirement in 1991. *Id.* at 5a. Respondent continued

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[3] Likewise, in a 1996 Report to Congress, FRA explained that it employs the OSHA criteria to determine compliance with the Locomotive Inspection Act. The trial court granted respondent's motion to exclude the 1996 Report from evidence because Respondent ceased working for Petitioner in 1991. Tr. 137-39. The court of appeals likewise rejected Petitioner's challenge to the exclusion of the 1996 Report. Pet. App. 22a.

to work for the DTS in Toledo, Ohio until 1989 or 1990 when the DTS merged with GTW. *Id.* at 5a n.1.

Respondent was diagnosed with COPD in December 1986. Pet. App. 6a. In August 2000, Respondent was diagnosed with laryngeal cancer. *Id.* He underwent radiation therapy and is cancer-free. Tr. 600 (Khan Video Dep. Tr. 37, 110). Respondent "admitted to a long history of heavy cigarette smoking," Pet. App. 6a, *i.e.*, he smoked, on average, a pack of cigarettes each day for 45 years (1946 to 1991), and thereafter he smoked intermittently from 1991 until 1993. The parties' medical experts agreed that the primary cause of Respondent's injuries was his extensive smoking history. *E.g.*, Tr. 888-95. Indeed, Respondent's counsel conceded that Mr. Shepard is "going to take half the responsibility for the damage that's been done to him." *Id.* at 1249 (closing argument); see also *id.* at 1195-96 (same).

As an engineer, Respondent was required to inspect the locomotives he operated and report defective or unsafe conditions. Tr. 783, 834-35. Respondent never reported a defect related to diesel exhaust or asbestos in a locomotive cab nor did he ever refuse to work on, with or around a locomotive because it smelled of diesel exhaust or contained asbestos. *Id.* at 460 (Shepard Video Dep. Tr. 58, 78-79, 85).

Fourteen years after he retired, Respondent filed suit alleging that his lung and heart injuries were caused by exposure to diesel exhaust and that his throat cancer was caused by exposure to asbestos-containing material in the locomotive cabs in which he worked. Respondent's position at trial was that every diesel locomotive he worked on during his 41-year career with the railroad was defective under the LIA because diesel exhaust entered the cab. *E.g.*, Tr. 583-84. Respondent and a co-worker offered

anecdotal testimony that diesel emissions came into the cab of the locomotive through cracks in the windows and doors. *Id.* at 583; see also *id.* at 460 (Shepard Video Dep. Tr. 39, 102).[4] Respondent acknowledged that diesel exhaust "was venting outside" the locomotive and then "coming in as it was traveling back towards the cab." *Id.* at 460 (Shepard Video Dep. Tr. 78). There was no evidence that Respondent was exposed to diesel exhaust or asbestos at levels in excess of permissible OSHA standards. Tr. 830, 1002, 1044.

C. Proceedings Below

1. In March 2005, Respondent filed suit in the Court of Common Pleas of Cuyahoga, Ohio, alleging that exposure to asbestos had caused his throat cancer and that exposure to diesel fumes had caused his COPD and heart problems. Pet. App. 4a. He admitted that he smoked a pack of cigarettes each day for 45 years. Tr. 460 (Shepard Video Dep. Tr. 14). Respondent asserted LIA and FELA claims, alleging both that the railroad violated the LIA through 49 C.F.R. § 229.43, and that this violation had a sufficient causal relationship to his injuries to warrant relief under FELA. Pet. App. 4a.

With regard to Respondent's LIA claim based on an alleged violation of 49 C.F.R. § 229.43, Petitioner's expert, Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance, explained that the FRA interprets this regulation to

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[4] According to Respondent, on one type of locomotive engine (GP9) exhaust would come up from the floorboards. Tr. 460 (Shepard Video Dep. Tr. 45). Respondent testified that he worked on locomotives with GP9s in the late 1980s or early 1990s, *after* he already had been diagnosed in 1986 with COPD. *Id.* (Shepard Video Dep. Tr. 77).

prohibit (1) diesel exhaust entering the cab at levels that exceed permissible thresholds set by OSHA; or (2) a locomotive engine with a defect, such as a crack in the exhaust system or manifold head gaskets. Tr. 1000-02. Mr. English explained that if "the engine is simply running on the track, without that type of defect and the stacks are high enough to exhaust into the air but some diesel exhaust enters the cab during ordinary running," that would not be a violation of Section 229.43. *Id.* at 1001-02.

Respondent failed to show that any of these conditions existed on any locomotives. For example, Respondent's expert, Dr. Leonard Vance, an industrial hygienist, admitted that he could not "identify a specific fault or defect in the chain of exhaust" or "point to a specific defect . . . , for example, a crack in a muffler or something along those lines, that sort of thing." Tr. 831, 833. Nor did Respondent introduce evidence that the alleged level of diesel emissions or asbestos in the cabs exceeded any applicable OSHA standards. *Id.* at 830, 999-1000, 1002, 1044. Instead, Respondent's evidence involved general assertions of a diesel fuel exhaust smell and the presence of material in the locomotives that Respondent believed was asbestos.

Petitioner proposed a jury instruction that would obligate Respondent to show proximate causation:

> If you find that the railroad was negligent, you must next determine whether the railroad's negligence caused the Plaintiff's injury in whole or in part. You need not find that the railroad's negligence was the sole cause, but you must find that it was a proximate cause of the Plaintiff's injury.

See GTW Proposed Jury Instructions at 35 (citing *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943)).

The trial court rejected Petitioner's submission and instead proposed to instruct the jury that Respondent could establish liability by showing that the alleged violations were a cause "however slight," "no matter how slight" or "even the slightest." Relying on *Sorrell* and the language of FELA, petitioner requested that the trial court omit such phrases from the jury instruction and requested that the jury be charged pursuant to the specific language of the FELA. Tr. 1260-61. The trial court overruled Petitioner's objection, concluding that the decision in *Sorrell* declined to reconsider the ruling in *Rogers* and therefore the court would follow its reading of *Rogers*. *Id.* at 1260. As a result, the trial court instructed the jury to find Petitioner liable if "the employer's negligence under the FELA or a violation of the Locomotive Inspection Act played any part, no matter how slight, in causing injury to the plaintiff." *Id.* at 1282-84.[5]

Applying this relaxed causation standard, the jury determined that GTW violated the FELA and the LIA. Pet. App. 5a. The jury returned an award of $872,756, consisting of $735,756 for his COPD/heart condition claim based on exposure to diesel exhaust and $137,000 for his cancer claim based on asbestos exposure. See Jury Interrogatory, General Verdict Forms. The jury also found Respondent 82%

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[5] When it instructed the jury on the causation standard applicable to Respondent's contributory negligence, the trial court omitted these same qualifying phrases. Tr. 1289, 1291-92. The court of appeals acknowledged that this was error, but concluded that this error was harmless. Pet. App. 15a n.3.

negligently responsible for his COPD/heart condition and 85% responsible for his throat cancer due to his extensive smoking history. *Id.* Given the LIA finding, Respondent's overwhelming comparative fault was negated, and Petitioner was liable for the entire judgment. The trial court rejected Petitioner's request for judgment notwithstanding the verdict and its request for a new trial. Pet. App. 4a-5a, 35a.

2. On appeal, Petitioner explained that the trial court erred by adopting both an erroneous causation standard under FELA and an erroneous interpretation of the requirements of the LIA.

First, Petitioner argued that the "any part, even the slightest" language from *Rogers* was not the proper standard for proving causation because FELA requires a plaintiff to prove that "'negligence was the proximate cause in whole or in part'" of the employee's injury. Pet. Appellate Br. 23 (quoting *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)). Petitioner explained that "[s]ince the inception of the FELA, a plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's injury," and that the trial court erroneously adopted a "relaxed causation standard," *i.e.*, "the 'in the slightest' standard . . . urged by [Respondent]." *Id.*

Second, Petitioner argued that the FRA has determined that there is no violation of 49 C.F.R. § 229.43 "where the engine in service has no defect in the exhaust system and the engine stacks are at the proper height but some diesel exhaust still enters the cab during normal operating procedures." *Id.* at 17. Rather, Petitioner argued that "the FRA has adopted [OSHA] exposure limits for diesel exhaust to determine violations of the LIA," *id.* at 15, and, according to the FRA, there is no violation of 49

C.F.R. § 229.43 "unless the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA," *id.* at 17.

The Ohio Court of Appeals affirmed. First, the court rejected Petitioner's challenge to the trial court's causation instructions. It adhered to the position that "jury instructions in a FELA railroad case containing the phrase 'even the slightest'" are appropriate. Pet. App. 17a. Specifically, it concluded that it is appropriate for a trial court to instruct a jury that a railroad may be found liable if its "'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers*, 352 U.S. at 506).

Likewise, the court below held that 49 C.F.R. § 229.43 "'prohibits diesel exhaust from coming into the cab of a locomotive.'" Pet. App. 12a (quoting testimony of plaintiff's expert, Dr. Vance). The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43. Instead, the court of appeals determined that it was sufficient to impose absolute liability under the LIA without any evidence quantifying exposure levels and without any evidence of a defect in the locomotive exhaust system. Pet. App. 12a-13a.

3. Petitioner sought discretionary review in the Ohio Supreme Court. Petitioner challenged the court of appeals' rulings as to the standard for proving causation under FELA. See Memorandum in Support of Jurisdiction of Grand Trunk Western Railroad 10-13 (June 22, 2010). Petitioner argued that the court of appeals improperly "eliminated proximate causation in FELA cases." *Id.* at 11. Petitioner also challenged the court of appeals' decision regarding the standard for establishing liability under the LIA based on a violation of 49

C.F.R. § 229.43. *Id.* at 8-10. Petitioner argued that the "FRA intended §229.43 to protect employees from excessive harmful levels of diesel exhaust pursuant to OSHA regulations, not to assure perfect working conditions." *Id.* at 10.

The Ohio Supreme Court declined to review the decision of the court of appeals, with two justices dissenting. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The petition should be granted to resolve two issues of nationwide importance.

I. The decision below implicates the same deep division of authority among the lower federal and state courts that caused this Court to grant certiorari in *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010). There, as here, the judgment below turns on whether FELA requires the jury to find that the alleged violation was a proximate cause of the injury or whether this Court's decision in *Rogers* "relaxes" plaintiff's traditional requirement to prove proximate causation in an action under FELA. Because the Court's ruling on the causation issue in *McBride* would control all of the claims in this case, this petition should be held pending this Court's resolution of *McBride*, and then resolved in accordance with the ruling in *McBride*.

II. Separately, certiorari is warranted to review the lower courts' refusal to follow the FRA's interpretation of the requirements of Section 229.43. In assessing whether a railroad has violated 49 C.F.R. § 229.43(a), the FRA employs OSHA's criteria regarding workplace concentration limits for the common products of diesel fuel combustion to determine compliance with the LIA. Tr. 989, 1001-

02, 1044. The courts below refused to follow the FRA's interpretation, and instead ruled that the entry of *any* diesel exhaust into a locomotive cab violates the LIA even in the absence of any defect in the locomotive equipment, and even if diesel exhaust levels are below permissible thresholds adopted by OSHA.

In reaching this conclusion, the court of appeals below ignored this Court's cases holding that courts must defer to an expert agency's reasonable interpretation of its own regulations. Instead, the courts below adopted an interpretation of an FRA regulation that imposes liability without any showing that employees are exposed to conditions that create "unnecessary danger of personal injury." 49 U.S.C. § 20701(1). That ruling places substantial and unwarranted burdens on railroads that stand in stark contrast to the FRA's own interpretation of its safety regulation. Review of this second issue should be granted because the ruling below conflicts with the controlling interpretive rules set forth by this Court.

I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* v. *MCBRIDE*, NO. 10-235, BECAUSE IT PRESENTS THE SAME ISSUE OF WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA.

This Court recently granted review in *McBride* to resolve the clear conflict among the lower courts on the question whether FELA requires the plaintiff to establish proximate causation. This case presents the same issue regarding the proper standard of causation under FELA. This case should be held pending resolution of *McBride*, and thereafter, Question 1 of this petition should be resolved in accordance with that decision.

This case implicates this same conflict as *McBride*. In this case, the jury was instructed that it could find causation under FELA if it concluded that Petitioner's conduct "play[ed] any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Tr. 1282-83; see *id.* at 1284. Petitioner proposed a "proximate cause" instruction and objected to the relaxed causation standard that the trial court gave to the jury. The trial court overruled Petitioner's objection. *Id.* at 1260-61. The Ohio Court of Appeals rejected Petitioner's challenge to this instruction on the merits. Pet. App. 14a-17a.

Whether FELA requires the jury to find proximate causation will directly affect the outcome of this case. A properly instructed jury could very well have concluded that Respondent's injuries were not proximately caused by Petitioner and would have occurred as a result of his smoking a pack of cigarettes each day for 45-years. That conclusion is bolstered by the jury's finding that Respondent's negligence – his history of smoking – made him overwhelmingly responsible (82% and 85% responsible) for his injuries.

The trial court's erroneous instruction eliminated the requirement that Respondent establish that the conduct of Petitioner was a proximate cause of his injuries. Instead, the jury was allowed to return a verdict against Petitioner based on a finding that Petitioner's conduct was a cause "however slight, in bringing about and actually causing injury or damage to Mr. Shepard." Tr. 1282-83; see also, *e.g.*, *id.* at 1284 ("It is up to you to determine whether the Defendant, under either of these two statutes, played any part, even the slightest, in bringing about his condition").

If the Court concludes in *McBride* that FELA requires a showing of proximate causation, then Petitioner respectfully submits that the petition should be granted, the judgment below should be vacated, and the case remanded to the lower courts for a new trial.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS.

Separately, review should be granted on the second question presented because the decision below conflicts with this Court's decisions holding that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.*, 512 U.S. at 512. As this Court has explained, in construing the requirements of a federal rule, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks omitted); *accord Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *accord Bowles*, 325 U.S. at 414; Davis, *supra*, § 7.22, at 105.

The decision below violates these standards because the court of appeals never assessed whether the FRA's interpretation of Section 229.43(a) was "plainly erroneous" or "inconsistent with the regulation." Instead, the court of appeals adopted its own reading of the requirements of Section 229.43(a) and, based on that erroneous interpretation, concluded that the evidence supported liability against Petitioner.

The court of appeals did not assess whether the exhaust allegedly entered the cab after being released

from the exhaust stack or whether it entered the cab directly as a result of a defect in the locomotive's exhaust system. Likewise, the court of appeals did not evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA. The use of OSHA exposure standards for diesel exhaust by the FRA demonstrates that generalized testimony from a plaintiff or a co-worker about the smell of diesel fumes is not enough to establish a federal violation. But according to the Ohio Court of Appeals, Section 229.43 "prohibits diesel exhaust from coming into the cab of a locomotive[.]" Pet. App. 12a (internal quotation marks omitted).

The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43 as set forth by Edward English, the former Director of the FRA's Office of Safety Assurance and Compliance. Tr. 999-1002. Instead, the court of appeals determined that it was sufficient to impose absolute liability under the LIA based on the mere presence or smell of diesel fumes in a locomotive cab without any evidence quantifying exposure levels and absent any evidence of a defect in the locomotive equipment. Pet. App. 12a-13a.

In marked contrast, the FRA's interpretation of Section 229.43 properly takes into account concerns regarding exposure to levels of diesel exhaust deemed "toxic" by OSHA while recognizing that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. at 21,098. FRA's interpretation is thus faithful to the language of Section 229.43(a), addresses the core concern of exposure to "toxic" levels of diesel exhaust and is therefore reasonable under the circumstances. The FRA's interpretation of Section 229.43(a) thus should

have been accorded "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

By refusing to do so, the court of appeals' decision effectively requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the locomotive cab.[6] Indeed, the court of appeals embraced Mr. Shepard's position that "the presence of diesel exhaust fumes inside the locomotive cabs" is a direct violation of Section 229.43. Compare Respondent's Appellate Br. 19 ("the presence of diesel fumes in the locomotive cab was a direct violation of [Section 229.43]"), with Pet. App. 12a-13a (following prior decision which held that Section 229.43 "'prohibits diesel exhaust from coming into the cab of a locomotive'") (quoting testimony of Respondent's witness Dr. Leonard Vance). As a result, the court of appeals adopted a *per se* standard under which Petitioner is strictly liable based solely on the presence of diesel exhaust fumes in the locomotive cabs. Pet. App. 12a.

This is a virtually impossible standard for railroads to defend, and effectively renders every locomotive in possible violation of a federal safety regulation. The decision below requires railroads to insure that no diesel exhaust, at any level, ever makes its way into a locomotive cab or risk liability under the LIA. *Dixson* v. *Burlington N. R.R.*, 795 F. Supp. 939, 940 (D. Neb. 1992) (holding that Section 229.43 is ambiguous as to

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[6] *Kayner* v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas Cnty., Neb. Mar. 2, 2006) ("the LIA regulation, 49 C.F.R. 229.43, does not provide that the cab must be entirely free of all diesel exhaust, . . . only that the locomotive exhaust stacks be of sufficient height to allow the diesel exhaust to be released entirely outside the cab and to prevent reentry of the exhaust under usual operating conditions").

whether it applies only to the lead locomotive). Even if the court of appeals' reading were a permissible one, the decision below ignores that the FRA is responsible for deciding "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

Review should be granted because the court of appeals' refusal to defer to the FRA's interpretation of Section 229.43(a) conflicts with this Court's precedent governing the interpretation of federal regulations. Moreover, the draconian interpretation of the regulation coupled with the rejection of a requirement of proximate causation eviscerates the requirement that employees are only entitled to damages for injuries that are the product of a railroad's negligence. The regime in Ohio effectively makes the railroad the guarantor of its employees' health, even when there clearly are multiple potential causes of injury.

This is not the liability scheme that Congress implemented in the FELA and only review by this Court can put FELA back on the right course.

CONCLUSION

For these reasons, with respect to Question 1, the petition for a writ of certiorari should be held pending resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), and then resolved in accord with the Court's decision in that case. Alternatively, the petition should be granted as to Question 2.

Respectfully submitted,

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January 11, 2011

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

[Filed OCT 13 2010]

Case No. 2010-1092

WILLIAM E. SHEPARD

v.

GRAND TRUNK WESTERN RAILROAD, INC.

ENTRY

Upon consideration of the motion for admission pro hac vice of Michael L. Torcello by Christopher M. Murphy,

It is ordered by the Court that the motion for admission pro hac vice is granted.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Cuyahoga County Court of Appeals; No. 92711)

/s/ Eric Brown
ERIC BROWN
Chief Justice

APPENDIX B

THE SUPREME COURT OF OHIO

CASE ANNOUNCEMENTS
October 13, 2010
[Cite as *10/13/2010 Case Announcements*, 2010-Ohio-4928.]

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* * * *

APPEALS NOT ACCEPTED FOR REVIEW

* * * *

2010-1092, Shepard v. Grand Trunk W. RR., Inc.

Cuyahoga App. No. 92711, 2010-Ohio-1853. Discretionary appeal not accepted.

Lundberg Stratton and O'Donnell, JJ., dissent.

Motion for admission pro hac vice of Michael L. Torcello by Christopher M. Murphy granted.

* * * *

APPENDIX C

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION

No. 92711

WILLIAM E. SHEPARD
Plaintiff-Appellee

vs.

GRAND TRUNK WESTERN RAILROAD, INC.
Defendant-Appellant

JUDGMENT:

AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-558055

BEFORE: McMonagle, P.J., Sweeney, J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the

judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Grand Trunk Western Railroad, Inc., appeals from the trial court's judgments denying its motions for (1) summary judgment, (2) a directed verdict, (3) judgment notwithstanding the verdict (JNOV), or alternatively, a new trial, and (4) remittitur. Grand Trunk also challenges a portion of the court's jury instructions.

Procedural History

{¶ 2} In March 2005, plaintiff-appellee, William E. Shepard, filed this action under the Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act (LIA). Shepard alleged that during his employment with the railroad, he was exposed to asbestos and diesel fumes in violation of the FELA and the LIA, and that as a result of such exposure, he developed chronic obstructive pulmonary disease (COPD), heart conditions, and laryngeal cancer.

{¶ 3} Grand Trunk filed a motion for summary in which it alleged that the action was filed outside of the three-year statute of limitations under the FELA. The motion was denied. The case proceeded to a jury trial. The railroad moved for a directed verdict at the conclusion of both Shepard's case and the presenta-

tion of all the evidence; both motions were denied. The jury returned a verdict in favor of Shepard, finding that the railroad had violated the FELA and the LIA, and awarded $872,756 to Shepard. The trial court subsequently entered a judgment in that amount in favor of Shepard. Grand Trunk filed motions for JNOV, or alternatively, a new trial, and remittitur, which were denied.

Facts

{¶ 4} Shepard began his employment with the railroad in 1950 and worked there continuously until his retirement in 1991.[1] Initially, he worked as a fireman on steam engines, and in 1954, became an engineer on the diesel engines until his retirement. He alleged that in both capacities he was exposed to asbestos and diesel exhaust fumes. Specifically, Shepard testified that as a fireman, he was exposed to asbestos and asbestos dust while working on the engines and in the buildings, especially in the roundhouse where the steam engines were repaired. According to Shepard, the asbestos lining the steam engine pipes where he worked were "raggedy" and asbestos was on the floor and piled against the walls in the roundhouse. He described "walking through" loose asbestos in the roundhouse. Shepard also testified that he was exposed to asbestos on the pipes of the diesel engines when he worked as an engineer.

{¶ 5} Shepard further described his exposure to diesel fumes. He testified that many times the diesel fumes "would come into your cab and just about suffocate you." According to Shepard, the fumes would enter the cab through leaky windows and

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[1] He started with the Detroit & Toledo Shoreline Railroad; it merged with Grand Trunk in 1989 or 1990.

doors, as well as through the floorboards. He described how he and his coworkers would sometimes stuff the cracks with paper towels. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 6} Shepard began having breathing problems at least by 1986. He was diagnosed with COPD in December 1986, had heart surgery in the late 1980's, and was diagnosed with laryngeal cancer in August 2000. He testified that sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment. He further testified, however, that he never told the doctor what he did for a living and he only saw that doctor on one occasion. According to Shepard, no other doctor or health care provider told him that his problems were related to his work.

{¶ 7} Shepard testified that he did not know, or have reason to know, that the substances he was exposed to were harmful to his health. He explained that the first time he became aware of the harmful effects of the substances was in 2005 when he was at a picnic for the railroad's retirees, saw a sign posted about breathing problems, and heard some other retirees discussing it.

{¶ 8} Shepard admitted to a long history of heavy cigarette smoking. Further facts will be developed in addressing the assignments of error.

Law and Analysis

The FELA and LIA

{¶ 9} A brief review of the FELA and LIA will be helpful. The FELA provides, in relevant part, that: "[e]very common carrier by railroad while engaging

in [interstate] commerce * * * shall be liable to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the [carrier's] negligence." 45 U.S.C. §51.

{¶ 10} To recover damages under the FELA, the plaintiff's injury must occur while acting within the scope of his employment and in furtherance of the employer's interstate business. See *Green v. River Terminal Ry. Co.* (C.A.6, 1985), 763 F.2d 805, 808. The employer's negligent conduct must also play a role in causing the employee's injury. Id.

{¶ 11} Congress enacted the FELA as a "broad remedial statute" to assist railroad employees when an employer's negligence causes injury. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-62, 107 S.Ct. 1410, 94 L.Ed.2d 563. The FELA is a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific RR. Co.* (1958), 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799. The Act is intended to be read liberally in favor of injured railroad employees. *Urie v. Thompson* (1949), 337 U.S. 163, 180, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶ 12} To supplement the FELA and to "facilitat[e] employee recovery," Congress enacted the LIA.[2] *Urie* at 189, 191; 49 U.S.C. §20701. The LIA requires that a locomotive must be "safe to operate without unnecessary danger of personal injury." Id. The LIA additionally empowers the Secretary of Transporta-

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[2] Formerly known as the Locomotive Boiler Inspection Act.

tion to prescribe regulations applicable to the railroad industry. When an employee can prove an employer has violated the LIA or a rule or regulation promulgated under the LIA, this "is effective to show negligence as a matter of law"; the employee need not show that the defendant employer's conduct was unreasonable. *Urie* at 189. So while the FELA generally requires that negligence be shown, a violation of LIA and its regulations suffices to prove negligence.

{¶ 13} The FELA and LIA should be read together as companion statutes. *Baltimore & O.R. Co. v. Groeger* (1925), 226 U.S. 521, 528, 45 S.Ct. 169, 69 L.Ed. 419. Because the LIA does not create an independent cause of action for personal injuries, injured parties rely on the FELA to recover damages caused by a LIA violation. *Matson v. Burlington N. Santa Fe RR.* (C.A.10, 2001), 240 F.3d 1233, 1235.

Motion for Summary Judgment

{¶ 14} In its first assignment of error, the railroad contends that the trial court erred by denying its motion for summary judgment.

{¶ 15} Appellate review of the trial court's ruling on a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 1998-Ohio-389, 696 N.E.2d 201, as follows:

{¶ 16} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said

party being entitled to have the evidence construed most strongly in his favor."

{¶ 17} Grand Trunk's motion for summary judgment was based on its claim that Shepard filed his case outside of the applicable statute of limitations. We disagree.

{¶ 18} The FELA provides that "no action shall be maintained under this act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. §56. Courts have consistently used "the discovery rule" to determine when the statute of limitations for a FELA claim begins to run. *Urie* at 170; *Campbell v. Grand Trunk W. RR. Co.* (C.A.6, 2001), 238 F.3d 772, 775; *Shesler v. Consol. Rail Corp.*, 151 Ohio App.3d 462, 2003-Ohio-320, 784 N.E.2d 725, ¶76. Under the discovery rule, the statute of limitations "begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Campbell* at 775.

{¶ 19} Grand Trunk argues that at least by the late-1980's, in regard to the COPD, and by August 2000, in regard to the laryngeal cancer, Shepard had an affirmative duty to investigate the cause of his illnesses. In support of its claim, the railroad relies solely on Shepard's admission that, sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment.

{¶ 20} Shepard, however, testified and averred (in a discovery deposition and affidavit) that he only saw that doctor on one occasion, he never told him what he did for a living, and no other doctors or health care providers ever alerted him to the cause of his health problems. Shepard further testified that although he

knew what asbestos was and that he was working with it, he did not know it, or the diesel fumes, were harmful and the railroad never provided any warnings or indication to its employees that they were. Further, Shepard had a long history of heavy cigarette smoking. In fact, in regard to Shepard's laryngeal cancer, the railroad's expert on this issue, Dr. Pierre Lavertu, was of the opinion that "the relationship between asbestos and laryngeal cancer is still controversial" and that Shepard's cancer was "secondary to his smoking habits." Thus, had Shepard seen Dr. Lavertu upon being diagnosed with laryngeal cancer, he would not have been told that his cancer was related to his asbestos exposure.

{¶ 21} On this record, the trial court did not err by denying Grand Trunk's summary judgment motion. The first assignment of error is overruled.

Motions for Directed Verdict and JNOV

{¶ 22} For its second assigned error, Grand Trunk contends that the trial court erred by denying its motions for a directed verdict and JNOV.

{¶ 23} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

{¶ 24} "When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 25} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

1. Diesel Exhaust

{¶ 26} The railroad maintains that Shepard failed to demonstrate an injury based on exposure to diesel exhaust. Specifically, it claims that Shepard failed to demonstrate that the locomotives on which he worked were not in proper condition and were not safe to operate.

{¶ 27} The LIA provides that: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad lines only when the locomotive or tender and its parts and appurtenances —

{¶ 28} "(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

{¶ 29} "(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

{¶ 30} "(3) can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. §20701.

{¶ 31} This court has held that "the LIA may be violated in two ways: (1) by failing to comply with Federal Railway Regulations, or (2) by fail[ing] to keep the locomotive in safe working condition." *Hager v. Norfolk & W. Ry. Co.*, Cuyahoga App. No. 87553, 2006-Ohio-6580, ¶31, citing *Mosco v. Baltimore &*

Ohio RR. (C.A.4, 1987), 817 F.2d 1088, 1091; *Reed v. Norfolk S. Ry. Co.* (N.D.Ohio, 2004), 312 F.Supp.2d 924, 926.

{¶ 32} Shepard's claim relative to exposure to diesel fumes was based on 49 C.F.R. §229.43(a), which provides that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating circumstances."

{¶ 33} In *Hager*, supra, this court found that the denial of a railroad's motion for a directed verdict on the plaintiff's claim of injury due to exposure to diesel fumes was proper. The employee offered the testimony of Dr. Leonard Vance, an industrial hygienist, who also testified for Shepard in this case. His opinion in this case was the same as in *Hager*: "Well, the Federal Railroad Administration has a regulation that prohibits diesel exhaust from coming into the cab of a locomotive, and what [Shepard] told me in his testimony in his deposition was consistent with that, was that it was a commonplace thing; that routinely happened that the cab would get diesel exhaust in. So I offered an opinion on whether or not the railroad had complied with that regulation. The opinion was that it hadn't." See, also, *Hager* at ¶34.

{¶ 34} Grand Trunk argues that *Hager* is not dispositive because: (1) it conflicts with this court's opinion in *Shesler*, supra, which stated that "[t]o establish a violation of the LIA, a plaintiff must show that the carrier's equipment is defective[,]" (citations omitted) id. at ¶62, and (2) there was testimony in this case that the fumes entered the cabs through windows opened by employees — a circumstance

beyond the control of the railroad. We are not persuaded.

{¶ 35} First, although this court in *Shesler* did cite a 1948 Second Circuit case for the proposition that a plaintiff must demonstrate that a carrier's equipment was defective to show a violation of the LIA, this court also stated that "[f]urther, the jury could find that the conditions to which the appellees were exposed on the appellant's railroad posed the very 'unnecessary danger of personal injury' contemplated by [the] LIA. 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.'" *Shesler* at ¶66, quoting 49 U.S.C. §20702(1), and *Lavender v. Kurn* (1946), 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed.2d 916.

{¶ 36} Second, the testimony of Shepard's coworker, Larry Berger, that sometimes fumes came into the cabs because employees opened the windows, must be taken in context. Specifically, Berger testified that the fumes would come in through cracks that were present throughout the cab. He described that "[t]he smoke comes from everywhere feasible. There is no way to escape it. It's an impossibility to escape." Berger therefore testified that the only way to ventilate the cab was to open the windows.

{¶ 37} Similarly, Shepard described the fumes as "suffocating," and testified that he and his coworkers would sometimes stuff the cracks with paper towels. Moreover, one of Grand Trunk's experts, Edward English, admitted that under the circumstances described by Shepard and Berger, a violation of the LIA occurred. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 38} On this record, the trial court properly denied the railroad's motions for a directed verdict and JNOV as to Shepard's claim based on exposure to diesel fumes.

2. Asbestos Exposure

{¶ 39} Grand Trunk also claims that Shepard failed to demonstrate an injury based on asbestos exposure. In support of its claim, the railroad argues that the mere presence of asbestos on a locomotive is not a violation of any federal regulation, as admitted by Shepard's expert, Dr. Vance. The evidence presented by Shepard went beyond the mere presence of asbestos, however. For example, Shepard testified about pipes on the locomotives wrapped in "raggedy" asbestos insulation and that asbestos was "piled up" in a tool cage in the roundhouse. Berger, Shepard's co-worker, also testified to asbestos being out in the open.

{¶ 40} On this record, the trial court properly denied Grand Trunk's motions for a directed verdict and JNOV on Shepard's LIA claim based on asbestos exposure.

{¶ 41} In light of the above, the second assignment of error is overruled.

Jury Instructions

{¶ 42} Grand Trunk contends that, over its objection, the trial court improperly quantified the degree of causation in its negligence instruction to the jury. Specifically, the trial court included the phrases "however slight," "no matter how slight," and "even the slightest" in its causation instruction. The railroad sought to have the court instruct with the phrase "in whole or part." The railroad largely relies

on two United States Supreme Court cases in support of its contention that the instruction given was in error: *Norfolk S. Ry. Co. v. Sorrell* (2007), 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638, and *CSX Transp., Inc. v. Hensley* (2009), __U.S.__, 129 S.Ct. 2139, 173 L.Ed.2d 1184. The railroad further argues that this court's decision in *Hager*, supra, which supports the instruction given, is flawed. We disagree.

{¶ 43} In *Sorrell*, the Supreme Court *declined* to address what standard for railroad negligence and employee contributory negligence should be used in instructing a jury in a case brought under the FELA. Rather, the Court held "that the causation standard should be the same for both categories of negligence[.]" Id. at 160.[3] Further, *Hensley* is not helpful to this case. Grand Trunk quotes with emphasis as follows from *Hensley*: "'* * * the nature of [asbestos] claims enhance the danger that a jury, without proper instruction, could award * * * damages based on slight evidence * * *.'" Grand Trunk's Brief at pg. 25, quoting *Hensley* at 2141. That quote, however, must be considered in context.

{¶ 44} Hensley brought suit against the railroad under the FELA for injuries sustained from his exposure to asbestos and a cleaning agent. He sought pain-and-suffering damages based on, among other things, his fear of developing lung cancer in the future. The trial court denied the railroad's proposed jury instruction that "'[i]n order to recover, Plaintiff

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[3] As noted by Grand Trunk, the trial court did not use the same phraseology it used when instructing on the railroad's negligence as when instructing on Shepard's negligence. We find the error to be harmless, however, in light of the fact that the jury found Shepard 82% negligent for his COPD and heart condition and 85% negligent for his laryngeal cancer.

must demonstrate * * * that the * * * fear is genuine and serious.'" Id. at 2140, quoting defendant's proposed jury instruction no. 30. The Supreme Court held that the trial court erred by not giving the instruction, stating:

{¶ 45} "Instructing the jury on the standard for fear-of-cancer damages would not have been futile. To the contrary, the fact that cancer claims could 'evoke raw emotions' is a powerful reason to instruct the jury on the proper legal standard. Giving the instruction on this point is particularly important in the FELA context. That is because of the volume of pending asbestos claims and also because the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting cancer. But as this Court said in [*Norfolk & W. Ry. Co. v.*] *Ayers* [(2003), 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261], more is required. Although plaintiffs can seek fear-of-cancer damages in some FELA cases, they must satisfy a high standard in order to obtain them. 538 U.S., at 157-158, and n. 17, 123 S.Ct. 1210. Refusing defendants' requests to instruct the jury as to that high standard would render it all but meaningless." *Hensley* at 2141.

{¶ 46} Because the *Hensley* Court was concerned with jury instructions for the unique aspect of emotional-distress damages based on the fear of developing cancer in the future, Grand Trunk's citation to that case is misplaced.

{¶ 47} In *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, the United States Supreme Court considered whether, under a claim based on the FELA, the probative facts of the

case warranted submission of the case to the jury. The court held that "the test of a jury case is simply whether the proofs justify with reason the conclusion that [employer] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Id. at 506. Citing *Rogers*, this court in *Hager*, supra, upheld jury instructions in a FELA railroad case containing the phrase "even the slightest." We similarly uphold the instructions given in this case. Accordingly, the third assignment of error is overruled.

Motion for New Trial

{¶ 48} In its fourth assigned error, Grand Trunk contends that the trial court committed numerous errors, all involving the admission or exclusion of evidence, the cumulative effect of which entitled it to a new trial.

{¶ 49} The decision to grant or deny a motion for new trial rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224, 649 N.E.2d 1219. The admission or exclusion of evidence is likewise within the sound discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

1. Disparate Application of Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division[4]

{¶ 50} Grand Trunk contends that the trial court disparately applied the rule because it precluded the railroad's expert from testifying about the lack of studies linking Shepard's cancer to asbestos exposure, but allowed Shepard's expert to testify as to his prognosis of death, which was not contained in his expert report. The primary purpose of the rule is "to avoid prejudicial surprise resulting from noncompliance with the report requirement." *Blandford v. A-Best Products*, Cuyahoga App. Nos. 85710 and 86214, 2006-Ohio-1332, ¶14.

{¶ 51} The railroad's expert, Dr. Pierre Lavertu, acknowledged in his expert report that there were studies showing a "possible association" between laryngeal cancer and asbestos exposure. The railroad sought to have him testify at trial that there were *no* studies linking asbestos exposure to laryngeal cancer and that the studies finding a causal link between the two did not involve any throat specialists. The testimony the railroad sought to elicit was contrary to Dr. Lavertu's report. The trial court therefore did not abuse its discretion by not allowing it.

{¶ 52} Likewise, the trial court did not abuse its discretion by allowing Shepard's expert, Dr. Shakil

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[4] The rule provides in relevant part as follows: "A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. * * * The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report."

Khan, to testify as to Shepard's prognosis of death. The trial court reasoned that, although such prognosis was not contained in Dr. Khan's report, the prognosis would not "come [ ] as any great surprise to the defense." This court has previously held that application of Loc.R. 21.1 "must be determined on a case-by-case basis." *O'Connor v. Cleveland Clinic Found.*, 161 Ohio App.3d 43, 2005-Ohio-2328, 829 N.E.2d 350, ¶21. With that in mind, and affording due deference to the trial court as we must, there was no abuse of discretion by allowing Dr. Khan's testimony.

2. Testimony From Shepard's Expert, Dr. Arthur Frank, Regarding the Causal Relationship Between Shepard's Cancer and his Asbestos Exposure

{¶ 53} The railroad contends that Dr. Frank's testimony and opinion regarding Shepard's laryngeal cancer were not based on reliable scientific, technical, or other specialized information as required under Evid.R. 702. We disagree.

{¶ 54} Dr. Frank relied on several sound scientific sources, including the National Academy of Science and the Journal of the American Medical Association, in forming his opinion. He admitted that there were reliable and valid sources rendering opinions on both sides of the issue of whether there is a causal relationship between laryngeal cancer and asbestos exposure. Even the railroad's expert on this issue, Dr. Lavertu, testified that "although the relationship between asbestos and laryngeal cancer is still controversial many studies have [shown] a possible association with a risk factor around 1.5." Dr. Frank's testimony was proper under Evid.R. 702, and the trial court did not abuse its discretion by allowing it.

3. Photographs and the United Transportation Union Complaint Letter

{¶ 55} Three photographs of locomotives were admitted into evidence over the railroad's objection. The locomotives in the photographs were not ones on which Shepard had worked, but he testified that they depicted the working conditions under which he had worked. Grand Trunk contends that the photographs were (1) not authenticated under Evid.R. 901(A), (2) irrelevant, and (3) highly prejudicial.

{¶ 56} Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Shepard testified what the photographs depicted and that the conditions shown in the images were fair and accurate representations of the locomotives and roundhouses on and in which he worked. The photographs were therefore authenticated.

{¶ 57} Further, the conditions under which Shepard worked were relevant and the probative value of the photographs was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Moreover, prior to the use of the photographs, the trial court gave a limiting instruction to the jury, in which it explained that there was no indication that the photographs were of locomotives on which Shepard actually worked and cautioned the jury that "[t]hey are solely given to you because Mr. Shepard says, '[t]his looks like what I was working under,' but it's for you ultimately to decide whether or not you want to accept that." On this record, the trial court did not

abuse its discretion by admitting the photographs into evidence.

{¶ 58} The Union letter, dated December 17, 1971, which was read by Dr. Vance (Shepard's expert) during his testimony, refers to a complaint about diesel fumes made by employees at Grand Trunk's Pontiac, Michigan site.[5] Grand Trunk objected to the letter on the grounds that (1) it was unauthenticated, (2) it was irrelevant because Shepard never worked at the Pontiac, Michigan site, (3) it was highly prejudicial.

{¶ 59} Documents can be authenticated under the ancient documents rule contained in Evid.R. 901(B)(8) if, "[e]vidence that a document * * *, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered."

{¶ 60} The letter was obtained by Shepard's counsel from Grand Trunk through discovery in another case. There was no evidence creating suspicion about its authenticity, and it was more than 20 years old at the time it was used. On this record, the letter was authenticated. Moreover, as with the photographs, the letter was relevant and its probative value was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶ 61} In light of the above, the trial court did not abuse its discretion by admitting the photographs

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[5] The letter was not admitted into evidence, but Grand Trunk contends that "the harm was already done as the jury was made aware of the contents of this unauthenticated, irrelevant and prejudicial letter through Dr. Vance's testimony."

into evidence and allowing Dr. Vance to read the Union letter during his testimony.

4. Exclusion of the Locomotive Crash Worthiness and Cab Working Conditions Report for Purposes of Cross-Examining Dr. Vance

{¶ 62} The Report was created in 1996 by the Federal Railroad Administration and contained the investigative results performed by General Electric and the Electromotive Division of General Motors (the same manufacturers used by Grand Trunk during the period of Shepard's employment) regarding the asbestos exposure in locomotive cabs.

{¶ 63} In *Hager*, supra, this court addressed the use of the Report in cases where the employee retired before its creation, stating that "the report was published in 1996, nine years after [the employee] ended his employment with the railroad. There was no evidence presented that any of the statements contained in the report accurately represented the working conditions encountered by [the employee] between 1943 and 1987." Id. at ¶23.

{¶ 64} Here, Shepard retired from Grand Trunk in 1991, five years before the Report was created. Thus, on the authority of *Hager*, the report was properly excluded.

5. Dr. Vance's Reading to Jury Portions of Shepard's Discovery Deposition

{¶ 65} At trial, Dr. Vance read a portion of Shepard's discovery deposition and testified that he relied on that portion of the deposition in forming his opinion. The railroad objected because Dr. Vance's testimony came after Shepard's trial testimony, Shepard did not testify at trial to the portion of his discovery

deposition read by Dr. Vance and, therefore, the railroad was not able to cross-examine him on this testimony.[6]

{¶ 66} The railroad cites *Hager* in support of its contention. There, the defendant railroad sought to present evidence of the employee's prior lawsuits and to read his interrogatory answers and his depositions from those lawsuits to impeach his credibility. The trial court refused the request, and this court affirmed, stating "[t]he trial court properly refused to allow [the railroad] to introduce evidence regarding [the employee's] prior lawsuits after his trial testimony had been completed. The proper time to have pursued this matter would have been when [the employee] was cross-examined. However, [the railroad] failed to ask him regarding his other lawsuits during cross-examination. [The railroad] could not then attempt to impeach him by reading his interrogatories and depositions from other lawsuits because this would prevent [the employee] the opportunity to provide further explanation. Because of his health problems, [the employee] was not present at the trial, and could not have been called to rebut this evidence." Id. at ¶20.

{¶ 67} Here, the testimony was not offered for the purpose of impeachment; rather, it was offered as an explanation of the basis of Dr. Vance's opinion. Evid.R. 705 provides that "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying

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[6] Specifically, Shepard testified at deposition that "I would be walking through the roundhouse on a sunny day. It was so dusty with asbestos that you couldn't see your hand in front of your face."

facts or data." The rule requires disclosure to "insure that the trier of facts is aware of the facts upon which the [expert's] opinion rests, so that in the event that the trier of facts rejects these facts as not having been established by the evidence, it will then be warranted in rejecting the opinion also." *Mayhorn v. Pavey* (1982), 8 Ohio App.3d 189, 191, 456 N.E.2d 1222.

{¶ 68} Further, the trial court gave a cautionary instruction to the jury, advising it that Dr. Vance was reading from Shepard's discovery deposition, not his trial testimony, and it would be up to the jury to determine whether Shepard's testimony was reliable. Moreover, Dr. Vance's report provided that, in forming his opinions, he "talked with Mr. Shepard and read his [discovery] deposition." Thus, the railroad was put on notice that the basis of Dr. Vance's opinions would be disclosed at trial. Accordingly, the trial court did not abuse its discretion by allowing Dr. Vance to read a portion of Shepard's deposition testimony.

6. Shepard's and Berger's Testimony about the Asbestos Content of Dust and Pipe Covering

{¶ 69} The Railroad contends that the trial court improperly allowed Shepard and his co-worker, Berger, to testify about their exposure to asbestos and asbestos-containing products because a foundation was not laid to demonstrate that they had personal knowledge of asbestos.

{¶ 70} Evid.R. 602 provides in part that, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

{¶ 71} This court addressed this argument in *Shesler*, supra, where the defendant railroad contended that testimony given by the plaintiffs about their exposure to asbestos lacked a proper foundation. The two plaintiffs testified that they became familiar with asbestos during their 40-plus years working for the railroad. Further, one plaintiff testified that he saw the word "asbestos" marked on materials being used. Both plaintiffs testified that they saw asbestos in the cabs of the locomotives on which they worked and witnessed other employees working with it around the yard.

{¶ 72} This court found that the testimony was properly admitted because "it [was] clear that the [plaintiffs] offered sufficient evidence to establish their personal knowledge of asbestos products, specifically, their personal exposure to products containing asbestos while employed on the railroad." Id. at ¶23. This court distinguished that case from *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691, a case relied on by Grand Trunk here.

{¶ 73} In *Goldman*, the Ohio Supreme Court held that the wife of a former bakery worker could not offer affidavits from several witnesses that they "believed" and "were told" that certain products in the bakery contained asbestos because they were not based on the personal knowledge of the witnesses.

{¶ 74} This court held that "there is a marked difference in the testimony of the [plaintiffs] based on personal knowledge which specifically referred to asbestos as opposed to the situation in *Goldman*, which was based largely on speculation and allegations by secondary witnesses." *Shesler* at ¶21. Likewise, here, Shepard and Berger had personal knowledge of the

presence of asbestos from their extensive railroad careers — 40-plus years for Shepard and almost 30 years for Berger. Both testified that they knew what asbestos looked like, they knew it was used on the railroad, and it was present on the railroad throughout their careers. On this record, the trial court properly allowed Shepard's and Berger's testimony.

7. The 1995 Deposition Testimony of Robert Yeager and the 1999 Videotape Deposition Testimony of Dr. Vincent Gallant

{¶ 75} Grand Trunk's final two grounds for a new trial were based on the trial court allowing Shepard to (1) read into evidence portions of the 1995 deposition testimony of Robert Yeager and (2) play the 1999 videotape deposition testimony of Dr. Vincent Gallant. The witnesses were declared unavailable and their testimony was therefore exempted from the hearsay rule. Grand Trunk contends that their testimony should have been excluded because they were not deposed for this case, and their testimony was irrelevant and unfairly prejudicial.

{¶ 76} Evid.R. 804 governs hearsay exceptions when a witness is unavailable. Subsection A of the rule defines unavailability and "includes any of the following situations in which the declarant: * * * (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity[.]" If the proponent of the testimony can demonstrate unavailability, Evid.R. 804(B)(1) allows testimony given at another hearing of a different proceeding to come into evidence "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to

develop the testimony by direct, cross, or redirect examination."

{¶ 77} Yeager, who was deceased at the time of the trial here, had been a co-worker witness in a Michigan asbestos case against Grand Trunk. Because Yeager was deceased at the time of trial, he was an unavailable witness under Evid.R. 804(A)(4). Dr. Gallant, who was the former Grand Trunk medical director, a Michigan resident, and had previously testified in a Michigan asbestos case (a different case from Yeager's), indicated to Shepard that he would not appear in court to testify because of his advanced age of 80 and poor health. Because of his physical illness or infirmity, Dr. Gallant was also an unavailable witness under Evid.R. 804(A)(4). We therefore consider whether Grand Trunk had an opportunity and similar motive to develop Yeager's and Dr. Gallant's testimony in the Michigan cases as required under Evid.R. 804(B)(1). Upon review, we find that it did.

{¶ 78} Specifically, both Michigan cases involved work injuries stemming from asbestos exposure on Grand Trunk's railroad. The witnesses' testimony in the Michigan cases was presented to prove that the railroad's locomotives contained asbestos (Yeager), and the railroad was aware of the asbestos and its harmful affects, and to show what, if any, training, education, or protection it gave to its employees (Dr. Gallant). On this record, Grand Trunk had an opportunity and similar motive to develop the testimony. Moreover, the testimony was relevant and was edited so that only the pertinent portions were admitted. Finally, the probative value of the testimony was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading

the jury." Evid.R. 403(A). On this record, the trial court did not abuse its discretion by allowing the testimony.

{¶ 79} In light of the above, the trial court did not abuse its discretion by denying Grand Trunk's motion for a new trial, and the fourth assignment of error is overruled.

Motion for Remittitur

{¶ 80} For its fifth and final assigned error, Grand Trunk contends that the jury's award was manifestly excessive and subject to remittitur. We disagree.

{¶ 81} We review a trial court's decision to deny remittitur under an abuse of discretion standard. See *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App.3d 211, 218, 644 N.E.2d 1058. "The assessment of damages is a matter within the province of the jury." *Carter v. Simpson* (1984), 16 Ohio App.3d 420, 423, 476 N.E.2d 705. It is not proper for the reviewing court to substitute its opinion for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 44, 495 N.E.2d 462. The denial of a motion for remittitur is not erroneous unless the award is so excessive as to appear to be the result of passion or prejudice on the part of the jury, or unless the amount awarded is excessive and against the manifest weight of the evidence. Id. To reverse the jury's damage award, it must appear to be "so disproportionate as to shock reasonable sensibilities." *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246, 258, 598 N.E.2d 1174.

{¶ 82} The jury awarded Shepard $775,000 in unliquidated damages ($650,000 for his COPD and heart condition and $125,000 for his laryngeal cancer).

It is Grand Trunk's contention that the award should have been reduced by Shepard's negligence.

{¶ 83} This court addressed this issue of apportionment of damages in *Ball v. Consol. Rail Corp.* (2001), 142 Ohio App.3d 748, 756 N.E.2d 1280:

{¶ 84} "The FELA allows workers to recover if an employer's negligence or statutory violation contributed in any way to their injuries. *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The statute also requires a parallel apportionment of damages whenever the evidence shows a worker's contributory negligence caused any part of his injuries. *Dixon v. Penn Cent. Co.* (C.A.6, 1973), 481 F.2d 833, 835. Apportionment is not allowed, however, where an employer is liable for violating certain safety statutes, including the Locomotive Boiler Inspection Act ("LBIA"). *Rogers*, 352 U.S. at 506, fn. 12. Because the jury found an LBIA violation, [the railroad] was not entitled to apportionment for contributory negligence * * *." (Parallel pinpoint cites omitted.) Id. at 754.

{¶ 85} Here, the jury was specifically instructed that Shepard alleged that two statutory violations were at issue: (1) the FELA, which requires negligence and provides for comparative negligence and (2) the LIA, which imposes absolute liability. Under FELA, the jury found Grand Trunk negligent and also found Shepard comparatively negligent. But because the jury further found that the railroad had violated the LIA, under well-settled law, it was not entitled to apportionment of damages under a comparative negligence defense.

{¶ 86} The award was not excessive in light of Shepard's health problems. He suffered with cancer,

which was resolved after two years of extensive radiation treatments. He suffers with severe and debilitating breathing problems, has been totally oxygen dependent since 2006, was hospitalized three times in 2008, and was placed on a mechanical ventilator at least once. Moreover, Grand Trunk's contention that the post-verdict discussions with the jury demonstrated that they believed the award was going to be reduced is not persuasive — a party many [sic] not challenge the validity of the verdict using post-verdict discussions with jurors. *Cleveland Elec. Illuminating Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 274, 480 N.E.2d 794, citing Evid.R. 606(B). The jury was properly instructed and is presumed to have followed those instructions. *Nolan v. Conseca Health Ins. Co.*, Jefferson App. Nos. 07 JE 30, 07 JE 31, 2008-Ohio-3332, ¶196.

{¶ 87} In light of the above, the fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX D

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
ASBESTOS DOCKET

Case No: 558055
JUDGE HARRY A. HANNA

WILLIAM SHEPARD,
Plaintiffs,

vs.

GRAND TRUNK WESTERN
RAILROAD, INC., *et al.*,
Defendant.

OPINION

Introduction

Defendant, Grand Trunk Western Railroad Incorporated (Grand Trunk) moves this Court to enter judgment notwithstanding the verdict, or alternatively, requests a new trial. A two week trial concluded on November 7, 2008, when the jury verdict was journalized for Eight Hundred Seventy-Two Thousand Seven Hundred Fifty-Six Dollars($872,756.00). The Court denies Grand Trunk's Motion for Judgment Notwithstanding the Verdict and denies the request for a new trial.

Law and Argument

1. Grand Trunk moves the Court under Civ. R. 50 (B) to enter judgment notwithstanding the verdict (JNOV) because Grand Trunk believes the jury's verdict is not supported by substantial evidence.

Grand Trunk argues that Plaintiff failed to submit during the course of trial a specific violation of the Locomotive Inspection Act, 49 U.S.C. §20707 *et seq.* (LIA). Section 207010 of the LIA states:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad lines only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without necessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. §20701.

Grand Trunk argues that Plaintiff failed to present any evidence of a particular defect in regards to the diesel exhaust to establish his claim under the LIA. The Court does not agree. Plaintiff testified about diesel fumes coming up from the floorboards of the cabs and through the loose windows and doors. Plaintiff testified regarding sticking paper towels in the windows to keep them from rattling, and at the same time, to keep the fumes from coming into the cab. Plaintiff's testimony is sufficient to establish a violation of the LIA to go to the jury. Arguments made by

Grand Trunk go to credibility, but do not show that the LIA claim was improper to go to the jury.

Grand Trunk argues that Plaintiff failed to present any evidence of a particular violation in regards to the asbestos to establish his claim under the LIA. Again, the Court does not agree. Plaintiff presented evidence of asbestos wrapped around the pipes in the engine room. Additionally, Plaintiff presented evidence that the pipes were raggedy. The evidence presented is sufficient to establish a violation of the LIA if believed by the jury.

2. Grand Trunk moves the court to grant a new trial under Civ. R. 59 (A) (6) because Grand Trunk believes the judgment is not sustained by the weight of the evidence.

Grand Trunk argues that a new trial should be granted because the evidence is inadequate to establish Plaintiff's LIA claim. Grand Trunk believes that the LIA claim cannot be sustained by the weight of the evidence. The argument presented was addressed in Grand Trunk's Motion for Remittitur, which was denied. Plaintiff presented evidence during the course of trial, and Grand Trunk disputed the evidence. The jury made a determination based on the evidence presented. The judgment is sustained by the weight of the evidence.

3. Grand Trunk moves the Court to grant a new trial under Civ. R. 59 (A) (7) & (9) because Grand Trunk believes the judgment is contrary to law and/or errors of law occurring at trial and were brought to the attention of the trial court.

Grand Trunk moves the Court for a new trial under Civ. R. 59 (A)(7) because Grand Trunk believes that the judgment is contrary to the law or under Civ. R. 59 (A)(9) because an error of law occurred and

was brought to the attention of the trial court. Defendant argues that good cause exists for granting a new trial because of the multiple errors of law occurring at trial.

An argument presented is that the Court erred in instructing the jury that the railroad is liable if its negligence played any part, even in the slightest, in causing Plaintiff's injuries. The phrase "even in the slightest" comes from *Rogers v. Missouri P.R. Co.* (1957), 352 U.S. 500, 506. It is a doctrine "which is long settled." *Norfolk S. Ry. Co. v. Sorrell* (2007), 127 S.Ct. 799. Besides, Grand Trunk waived any claim of error when it declined to offer corrections to the charge when invited by the court to do so.

An argument presented is that the cumulative errors that include the unfair prejudice to Grand Trunk due to the application of Loc. R. 21.1 warrant a new trial. It was clear from discussions on and off the record that Grand Trunk was seeking to elicit from Dr. Lavertu an opinion that Plaintiff's cancer could not be attributed to exposure to asbestos. This would have been fatal, if believed, to Plaintiff's claim and was not in the witness's report. There is not a hint of such an opinion expressed in the report, so to permit the doctor to so testify would have been unfairly prejudicial to the Plaintiff.

Dr. Khan's records, on the other hand, indicate that the Plaintiff's disease was both chronic and progressive, thus leading to the inference that it would probably be the cause of his death. There was no impropriety in allowing Dr. Kahn to offer that opinion. The near-death episodes of pulmonary failure already experienced by Plaintiff also supported that opinion. The application of Loc. R. 21.1 was even handed and based upon the evidence.

Grand Trunk argues that the jury interrogatories were misleading and ambiguous. The argument is not well taken. The interrogatories were proposed by the Defendant and re-typed by the Defendant after hours of argument over the charge and interrogatories. Furthermore, no objection or correction was offered by the Defendant when invited by the Court near the conclusion of the charge. At no time did Grand Trunk articulate any improprieties in its own requested interrogatories.

Another argument presented is that it was an error to permit Plaintiff and his co-worker to testify about the pipe covering containing asbestos. Both Mr. Shepard and Larry Berger gave testimony that each man had working knowledge of asbestos based upon the years of working around it on the railroad. Grand Trunk's argument fails according to *Shesler v. Conrail* (2003), 151 Ohio App. 3d 462.

Conclusion

Grand Trunk moves for a judgment notwithstanding the verdict pursuant to Rule 50(B) of the Ohio Rules of Civil Procedure, and for a new trial pursuant to Rule 59 (A)(6), (7) and (9) of the Ohio Rules of Civil Procedure. Defendant has failed to show that the verdict was not supported by substantial evidence or that errors of law occurred requiring a new trial. For all of these reasons, Defendant's Motion for JNOV is Denied and Defendant's request for a new trial is Denied.

[RECEIVED FOR FILING
DEC 24 2008]

So Ordered

/s/ Judge Harry A. Hanna
Judge Harry A. Hanna
December 16, 2008

APPENDIX E

FEDERAL STATUTES

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

APPENDIX F

FEDERAL REGULATION

49 C.F.R. § 229.43. Exhaust and Battery Gases

(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

(b) Battery containers shall be vented and batteries kept from gassing excessively.

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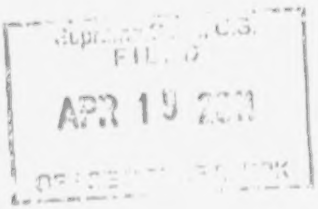

No. 10-925

IN THE
Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

BRIEF FOR RESPONDENT IN OPPOSITION

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April 19, 2011

QUESTIONS PRESENTED

1. Whether this case should be held pending this Court's resolution of *CSX Transportation, Inc. v. McBride*, No. 10-235 (U.S. argued Mar. 28, 2011), even though petitioner forfeited the argument that the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of "proximate cause."

2. Whether the Ohio courts erred in not deferring to the interpretation of a federal regulation advanced by petitioner's retained expert witness, where petitioner never argued in the state courts that such deference was warranted and where that witness no longer worked for the agency that promulgated the regulation at issue.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 4

REASONS FOR DENYING THE PETITION 11

I. THE PETITION SHOULD NOT BE HELD PENDING *McBRIDE* BECAUSE PETITIONER DID NOT PRESERVE THE ISSUE PRESENTED IN THAT CASE 11

II. PETITIONER'S SECOND QUESTION IS NOT PROPERLY PRESENTED HERE AND REVIEW IS UNWARRANTED IN ANY EVENT 12

A. Petitioner Forfeited Its Deference Claim And, In Any Event, Identifies No Agency Interpretation To Which Deference Could Be Given 13

B. In Any Event, Review Is Unwarranted 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 14, 15

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 14

Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011) 3

Coleman v. Thompson, 501 U.S. 722 (1991) 13

Duignan v. United States, 274 U.S. 195 (1927) 14

Lyng v. Payne, 476 U.S. 926 (1986) 14

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) 2, 9, 10, 12

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 14

Urie v. Thompson, 337 U.S. 163 (1949) 5, 15

Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588 (2001) 4

STATUTES, REGULATIONS, AND RULES

Boiler Inspection Act, ch. 103, 36 Stat. 913 (1911) 1

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ..... 1, 2, 5, 9, 11, 15

§ 1, 45 U.S.C. § 51 5

§ 3, 45 U.S.C. § 53 ..... 6, 15, 16

Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703 ..... 1, 5, 10, 15

49 C.F.R. § 229.43(a)..... 1, 2, 3, 5, 6, 10, 13, 15, 16
Ohio R. Civ. P. 51(A)..... 11

ADMINISTRATIVE MATERIALS

45 Fed. Reg. 21,092 (Mar. 31, 1980)..... 16

OTHER MATERIALS

CSX Transp., Inc. v. McBride, No. 10-235 (U.S.):

Brief for Petitioner (filed Jan. 13, 2011)..... 12

Petition for a Writ of Certiorari (filed Aug. 18, 2010)..... 11

INTRODUCTION

Over the course of his more than 40 years working for petitioner's railroad, respondent was exposed to dangerous diesel exhaust fumes and asbestos. As a result of that exposure, he suffers from multiple serious health problems. To recover for his employment-related injuries, respondent brought an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. He alleged that petitioner was negligent in failing to provide safe working conditions. He further alleged that the presence of diesel exhaust fumes and asbestos in the cabs of the locomotives in which he worked violated the Locomotive Inspection Act ("LIA"), 49 U.S.C. §§ 20701-20703 (originally enacted as the Boiler Inspection Act, ch. 103, 36 Stat. 913 (1911)). The Federal Railroad Administration ("FRA") has implemented LIA in a rule providing that diesel exhaust must "be released entirely outside the cab" and that means must be provided "to prevent entry of" exhaust fumes "into the cab." 49 C.F.R. § 229.43(a). Respondent contended at trial that petitioner's failure to comply with LIA, as interpreted in the FRA's regulation, constituted negligence per se under FELA.

A jury found that petitioner violated FELA and LIA and that respondent suffered injuries resulting from those violations. The trial court entered judgment on the jury's verdict and denied petitioner's motion for judgment notwithstanding the verdict ("JNOV") or a new trial. The court of appeals of Ohio affirmed the trial court's judgment, and the Supreme Court of Ohio denied review.

Petitioner raises two claims in its petition. First, it contends that the petition should be held for *CSX Transportation, Inc. v. McBride*, No. 10-235 (U.S.

argued Mar. 28, 2011), because (it claims) this case presents the same issue that is before the Court in *McBride* — namely, whether "proximate cause" is an element of a FELA claim. Second, petitioner argues that the decision below conflicts with this Court's decisions requiring deference to agencies' interpretations of their own regulations, because (it asserts) the Ohio courts failed to defer to an FRA interpretation of § 229.43(a). Neither of those claims is properly presented here, and the petition should be denied.

I. Petitioner forfeited the argument that FELA requires a finding of "proximate cause." Although petitioner proposed a jury instruction that would have required such a finding, it failed to object to the trial court's decision not to give that instruction. Nor did it raise the absence of an instruction on "proximate cause" in its post-judgment motion in the trial court or on appeal in the state appellate court.

Petitioner did object to the trial court's instruction, consistent with this Court's precedent, that the jury could find petitioner liable if its "negligence played any part, even the slightest, in producing" respondent's injuries. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957). Petitioner's argument was that the trial court should have omitted the phrase "even the slightest" from the charge to the jury. But, even if that request had been granted, the jury instructions still would not have included any mention of the common-law concepts of "proximate cause" that petitioner now claims FELA incorporates.

Having failed to preserve in the Ohio courts the argument that "proximate cause" is an element of a FELA claim, petitioner should not be permitted to seek any benefit from this Court's decision in *McBride*.

II. Petitioner also argues that the lower courts should have deferred to the interpretation of § 229.43(a) espoused in the trial testimony of petitioner's retained expert witness, a former FRA employee. But petitioner never argued in the Ohio courts that its expert's testimony should be given deference. And, even if it had so argued, the testimony of a former agency employee has never been considered the *agency's* fair and considered judgment for purposes of this Court's cases on deference to an agency's regulatory interpretation. For each of those reasons, petitioner's deference claim is not properly presented here.

Further review of that claim would be unwarranted in any event. The standard for judicial deference to an agency's interpretation of its own regulation is well-settled, having been reaffirmed by this Court less than three months ago. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011). And the petition identifies no division of authority in the federal courts of appeals or state supreme courts regarding the construction of § 229.43(a). Petitioner's challenge to the decision below is thus nothing more than a fact-bound plea for error correction that does not merit review by this Court.

STATEMENT

1. From 1950 until his retirement 1991, respondent worked for petitioner and its predecessor. Pet. App. 5a & n.1.[1] During the first four years of his tenure, he worked as a fireman. *Id.* at 5a. Starting in 1954 and continuing until his retirement, respondent was an engineer on diesel locomotives. *Id.*

Throughout his employment with petitioner, respondent was exposed to asbestos and diesel exhaust fumes. *Id.* Respondent testified that loose asbestos was stored on the floor in the building where he worked as a fireman and that it covered the pipes of the diesel locomotives in which he worked as an engineer. *Id.* He further testified that, as an engineer, he was exposed to diesel exhaust fumes that entered through leaks in the windows, doors, and floorboards of the cabs of the locomotives in which he worked. *Id.* at 5a-6a. And he explained that he was exposed to diesel exhaust working in the yard where the locomotives operated. *Id.* at 6a. Respondent's former co-worker, Larry Berger, corroborated respondent's testimony regarding the presence of asbestos and diesel exhaust fumes in the locomotives and the yard. *Id.* at 13a-14a; Tr. 566-75.

Respondent suffered from a variety of health problems resulting from those working conditions. He developed breathing problems and, in 1986, was diagnosed with chronic obstructive pulmonary disease (also known as "COPD"). *Id.* Later that decade, respondent underwent surgery for heart problems.

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[1] The Court views the facts "in the light most favorable to the verdict winner" (here, respondent). *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 590 (2001).

Id. In 2000, respondent was diagnosed with laryngeal cancer. *Id.*[2]

2. In March 2005, respondent sued petitioner, asserting claims under FELA. Pet. App. 4a.[3] He alleged that, while working for petitioner, he was exposed to asbestos and diesel exhaust and that, as a result of that exposure, he developed COPD, heart conditions, and laryngeal cancer. *Id.* Respondent asserted that petitioner's failure to maintain safe working conditions was negligent and that those conditions violated LIA. With respect to his claim that the presence of diesel exhaust in the cabs of the locomotives in which he worked violated LIA, respondent relied on the FRA's regulation interpreting LIA to require that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." 49 C.F.R. § 229.43(a).

Under FELA, a railroad's violation of a safety statute such as LIA constitutes negligence per se. *See Urie v. Thompson*, 337 U.S. 163, 189 (1949).

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[2] Respondent testified that, before 2005, he was not aware of the dangers of the substances to which he was exposed while employed by petitioner. Pet. App. 6a. In that year, he attended a picnic for former employees of petitioner where he saw a sign posted regarding breathing problems and heard other retirees discussing such issues. *Id.*

[3] FELA § 1 provides, in pertinent part, as follows: "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

Such a violation also precludes the railroad from seeking to reduce or eliminate its liability by arguing that the plaintiff's own negligence also contributed to the injury. *See* 45 U.S.C. § 53 ("[N]o such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.").

At trial in 2008, petitioner presented the testimony of a former employee of the FRA, Edward English, who last worked for that agency in 2001. Tr. 982. Mr. English opined that a violation of § 229.43(a) would occur only if a locomotive's exhaust system was "defect[ive]" or if the amount of diesel exhaust present in the cab failed to meet "OSHA [Occupational Safety and Health Administration] standards." Tr. 1000-02. Mr. English did not identify any published FRA interpretation supporting his view of the FRA's regulation.[4] He also "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." Pet. App. 13a.

With respect to the jury instructions, the trial court received proposed instructions in writing from the parties and heard argument regarding the instruc-

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[4] Petitioner notes (at 7 n.3) that the trial court granted a motion *in limine* regarding a 1996 report to Congress prepared by the FRA. But petitioner sought to use that report for a different purpose — namely, to address the presence (or lack) of *asbestos* in locomotive cabs, not to establish the proper interpretation of the FRA's regulation on *diesel exhaust*. *See* Def.'s Bench Br. Regarding Admissibility of FRA's Locomotive Crashworthiness and Cab Working Conditions Report to Congress (Oct. 24, 2008); Pet'r C.A. Br. 33-34 (June 25, 2009); Pet'r C.A. Reply Br. 7 (Sept. 24, 2009).

tions on and off the record. Tr. 1103, 1155-62.[5] Following closing arguments and before instructing the jury, the court gave the parties an opportunity to note on the record any objections to the court's final proposed jury instructions. Tr. 1260-63. The court observed that petitioner had "requested that I strike the language, 'in the slightest degree[,]' from the causation definition." Tr. 1260. Petitioner added that it "believe[d] that the jury should just be charged in the language of the statute, and the statute says 'in whole or in part,' and that is the standard for a violation of the FELA, and that's what . . . the charge should be." Tr. 1261. Petitioner stated no other objection to the jury instructions. *See* Tr. 1260-63. In particular, it did not indicate any objection to the lack of an instruction on "proximate cause." *See id.*

The trial court denied petitioner's objection and instructed the jury regarding causation as follows:

> For purposes of action under the FELA, an injury or damage is said to be caused or contributed to by an act or a failure to act that plays any part in the matter, however slight, in bringing about and actually causing injury or damage to Mr. Shepard. So if you find from a preponderance of the evidence in this case that the Defendant Railroad was negligent to any degree or failed to provide Plaintiff with a reasonably safe place to work and this contributed in any way toward an injury or a disease or damage suffered by Mr. Shepard, then you may find that such

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[5] Petitioner proposed an instruction requiring the jury to find that the railroad's negligence "was a proximate cause of" respondent's injury. Def.'s Proposed Jury Instructions at 35.

injury or damage was caused by the Defendant's acts or omissions.

. . .

. . . It is important to remember that there can be more than one cause of an injury or condition. Involvement with any other cause does not prevent a finding for the Plaintiff, so long as you find that the — either the employer's negligence under the FELA or a violation of the Locomotive Inspection Act played any part, no matter how slight, in causing injury to the Plaintiff.

You've heard evidence that Plaintiff suffers from lung and respiratory disease. It is up to you to determine whether the Defendant, under either of these two statutes, played any part, even the slightest, in bringing about his condition. If you find that the Defendant's acts played no part in bringing about these injuries, then I charge you that the Defendant is not liable for these injuries, and Plaintiff, having failed on the question of causation, your job is done; you find for the railroad.

You should only award damages to the extent that the injury or disease is caused by a failure on the part of the railroad to abide by either or both of these two statutes. Under the FELA, the railroad does have to exercise ordinary care to furnish its employees with a reasonably safe place to work. That is a nondelegable duty on the part of the railroad; that is, they can't shift the duty to someone else. However, the railroad does not ensure the safety of its employees.

So again, to recover as to the Defendant, the Plaintiff has the burden of proving, as we said, by a preponderance of the evidence that there was

> either negligence under the FELA or a violation of the Locomotive Inspection Act, and that either violation contributed in whole or in part to his disease or his condition.

Tr. 1282-85.

The jury returned a verdict in respondent's favor. Pet. App. 5a, 31a. It found that petitioner violated FELA and LIA. *Id.* at 5a. And it awarded $872,756 in damages to respondent. *Id.*

The trial court denied petitioner's motion for JNOV or a new trial. *Id.* at 31a-35a. In so doing, the court rejected petitioner's argument that "the Court erred in instructing the jury that the railroad is liable if its negligence played any part, even in the slightest, in causing Plaintiff's injuries." *Id.* at 34a. It explained that "[t]he phrase 'even in the slightest' comes from" this Court's decision in *Rogers*. *Id.*

The court also rejected petitioner's challenge to the sufficiency of the evidence supporting the jury's finding that petitioner violated LIA. It explained that respondent's testimony regarding his exposure to diesel exhaust fumes and asbestos supported the jury's verdict. *Id.* at 32a-33a.

In its motion for JNOV or a new trial, petitioner did not argue that the trial court erred in failing to instruct the jury on "proximate cause." Nor did it argue that deference was due to the testimony of its retained expert witness, Mr. English, regarding the proper interpretation of § 229.43(a).

3. The court of appeals of Ohio affirmed. Pet. App. 3a-30a.

Petitioner reiterated its claim that the trial court improperly included "the phrases 'however slight', 'no matter how slight' and 'even the slightest' [in] the

jury charge." Pet'r C.A. Br. 20. It argued that the jury should have been "charged pursuant to the specific language of the FELA, which, with reference to causation, includes the words 'in whole or in part.'" *Id.* at 20-21. Petitioner did not contend that the trial court should have given its proffered instruction on "proximate cause."[6] The court of appeals rejected petitioner's claim of instructional error, relying on this Court's decision in *Rogers*. Pet. App. 14a-17a.

Petitioner also challenged the sufficiency of the evidence supporting the jury's finding that respondent's exposure to diesel exhaust constituted a violation of LIA. Although petitioner argued that respondent was obligated either to identify a defect in the exhaust system of a locomotive in which he worked or to show that exhaust levels exceeded OSHA standards, it did not contend that deference should be given to Mr. English's interpretation of § 229.43(a). *See* Pet'r C.A. Br. 13-19. The court of appeals rejected petitioner's argument, concluding that the record supported the trial court's denial of petitioner's JNOV motion. Pet. App. 11a-14a. The court noted that Mr. English "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." *Id.* at 13a.

The Supreme Court of Ohio declined petitioner's request for discretionary review. *Id.* at 1a-2a.

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[6] *Cf.* Pet'r C.A. Br. 24 (arguing that the jury should "be instructed to determine whether the railroad's negligence caused the plaintiff's injury in whole or in part, i.e., that it was a proximate cause of the injury").

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD NOT BE HELD PENDING *McBRIDE* BECAUSE PETITIONER DID NOT PRESERVE THE ISSUE PRESENTED IN THAT CASE

Petitioner contends (at 15) that this case should be held pending resolution of *McBride* because it "presents the same issue" of "whether FELA requires the plaintiff to establish proximate causation." But petitioner did not preserve the claim that proximate causation is an element of a FELA claim. Accordingly, the petition should not be held pending *McBride* and instead should be denied.

The question presented in *McBride* is "[w]hether [FELA] requires proof of proximate causation." Cert. Pet. i, *McBride*, *supra* (filed Aug. 18, 2010). Petitioner did not preserve that issue in this case. Although petitioner proposed an instruction that would have required the jury to determine whether petitioner's negligence was a "proximate cause" of respondent's injuries, petitioner did not object to the omission of that instruction from the trial court's charge to the jury. *See supra* pp. 6-7.[7] Nor did petitioner raise the failure to give that instruction either in its motion for a new trial or in its brief on appeal. *See supra* pp. 9-10. Consequently, petitioner forfeited any claim that the jury should have been instructed to find that petitioner's negligence was a "proximate cause" of respondent's injuries.

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[7] *See also* Ohio R. Civ. P. 51(A) ("On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.").

Petitioner's objection to the use of "slight" and its variants in the jury instructions did not preserve the *McBride* issue. Objecting to an instruction that causation can be found where the negligence played a part, "however slight," in bringing about the injury is quite different from asserting that the jury must be instructed to find affirmatively that the negligence was a "proximate cause" of the injury.[8] Even if the trial court had sustained petitioner's objection and removed any reference to "slight" or "slightest" from the instructions, the jury charge still would not have included any mention of a common-law requirement of "proximate cause."

Because petitioner failed to preserve an objection to the omission of a jury instruction on "proximate cause," it should not be permitted to seek any benefit from this Court's decision in *McBride*. The petition should be denied.

II. PETITIONER'S SECOND QUESTION IS NOT PROPERLY PRESENTED HERE AND REVIEW IS UNWARRANTED IN ANY EVENT

Petitioner contends (at 17) that the second question presented independently warrants this Court's review because the Ohio court of appeals should have given "deference" to "the FRA's interpretation of Section 229.43(a)." That claim is not properly presented in this case. Regardless, review is unwarranted.

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[8] The railroad in *McBride* argues that the language "any part, even the slightest" in the Court's opinion in *Rogers*, 352 U.S. at 506, is unrelated to "proximate cause." *See* Brief for Pet'r 38, *McBride*, *supra* (filed Jan. 13, 2011).

A. Petitioner Forfeited Its Deference Claim And, In Any Event, Identifies No Agency Interpretation To Which Deference Could Be Given

For two reasons, the second question is not properly presented here.

First, petitioner's deference claim was not pressed or passed on below.[9] Petitioner never argued that the state courts should defer to any FRA interpretation of the regulation in question, 49 C.F.R. § 229.43(a). Even assuming for the sake of argument that the testimony of petitioner's expert witness represented the view of the FRA (even though he had not worked for the agency in years), petitioner did not contend that the courts below owed *deference* to the expert witness's understanding of the regulation. Nor did it cite below any case from this (or any other) Court involving deference to an agency's regulatory interpretation.

Indeed, if petitioner had raised this argument for the first time in the Ohio court of appeals, and that court had held it to be forfeited, this Court would be jurisdictionally precluded from considering the issue under the adequate-and-independent-state-ground doctrine. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Petitioner should not be rewarded for sandbagging the *entire* state judicial process, rather than just part of it.

Thus, as with its *McBride* claim, petitioner forfeited its deference claim by failing to raise it in the Ohio courts. Review is unwarranted for that reason

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[9] Petitioner concedes that the state appellate court did not decide the deference issue. *See* Pet. 13 ("The court of appeals did not address the FRA's interpretation of 49 C.F.R. § 229.43.").

alone. *See, e.g., Duignan v. United States*, 274 U.S. 195, 200 (1927) (Court generally does not review "questions not pressed or passed upon below").

Second, review of the second question presented is unwarranted in this case for the additional reason that petitioner identifies no *agency* interpretation to which deference could be given. It relies entirely on the testimony of its retained expert witness, a "*former*" employee of the FRA. Pet. 18 (emphasis added). But this Court considers deference claims only when a regulatory interpretation represents "*the agency's*" — not a former employee's — "fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (emphasis added). Thus, as the cases petitioner cites (at 17) illustrate, the Court has given weight to positions articulated in a legal brief filed by an agency (*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513-14 (1994)); a staff instruction document issued by an agency (*Lyng v. Payne*, 476 U.S. 926, 939 (1986)); and a bulletin and a report issued by an agency (*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945)). But petitioner cites no case, and we are aware of none, in which this Court deferred to the testimony of a paid expert witness who *used to* work for an agency. Because petitioner does not rely on an interpretation of the FRA — as opposed to its retained expert witness, who no longer works for the agency — the question of deference due to an agency's interpretation of its own regulation is not presented in this case.

B. In Any Event, Review Is Unwarranted

Apart from those deficiencies, the second question presented is unworthy of this Court's consideration at this time. Petitioner identifies no conflict among

the federal courts of appeals or state supreme courts regarding the proper standard for determining the deference owed to an agency's regulatory interpretation. In fact, the standard is clear. Under this Court's cases, an agency's interpretation of its own regulation is "controlling," unless the interpretation is "plainly erroneous or inconsistent with the regulation" or does not "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 461-62 (internal quotation marks omitted). Because the legal standard governing petitioner's claim is well-settled, the claim represents, at most, a fact-bound request for error correction.

Further, this case would be a poor vehicle in which to consider the deference question, because resolving that issue in petitioner's favor would not affect the outcome of the case. Petitioner's expert "admitted that[,] under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred." Pet. App. 13a. The jury was entitled to credit the testimony of respondent and his co-worker regarding the conditions in which they worked. Consequently, there was sufficient evidence to sustain the jury's verdict even under the construction of § 229.43(a) advanced by petitioner's expert.[10]

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[10] Petitioner rightly concedes (at 4) that, where (as here) the jury finds a violation of LIA, a railroad cannot benefit from a comparative-negligence defense. FELA plainly provides that, when a railroad violates a safety statute such as LIA, and that violation "contribute[s] to" the employee's injury, the employee will not "be held to have been guilty of contributory negligence." 45 U.S.C. § 53. This Court has long given that language in FELA § 3 its plain meaning and explained that railroads cannot rely on the defense of contributory negligence in cases involving violations of safety statutes. *See Urie*, 337 U.S. at 188 (§ 3 "bar[s] pleading[] of . . . contributory negligence . . . 'in any case

Moreover, the Ohio courts' interpretation of the FRA's regulation is correct, and petitioner's contrary interpretation is erroneous. The regulation provides as follows: "Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." 49 C.F.R. § 229.43(a).

By its plain terms, that regulation requires that exhaust fumes "be released *entirely* outside the cab" and specifies that the exhaust system must "*prevent* entry" of exhaust fumes "into the cab." *Id.* (emphases added). The regulation contains no language indicating that there must be a specific defect in the exhaust system or that the amount of exhaust fumes in the cab must exceed some threshold set by OSHA before a failure "to prevent entry" of fumes into the cab constitutes a violation. Petitioner's contrary construction finds no support in the regulation's text or history.[11]

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where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee'") (quoting 45 U.S.C. § 53).

[11] The Federal Register notice that petitioner cites (at 6-7, 18) says only that "it is impossible to prevent the entry of some fumes into the cab *in certain* ***unusual*** *wind and weather conditions*." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980) (emphases added). That is fully consistent with the regulation's plain language, which provides that, "under *usual* operating conditions," exhaust fumes must be kept out of the cab. 49 C.F.R. § 229.43(a) (emphasis added); *see* 45 Fed. Reg. at 21,098 ("means must be provided to *prevent* entry of products of combustion into the cab *under usual operating conditions*") (first emphasis added). Petitioner does not argue that respondent's exposure to diesel exhaust fumes occurred only in "certain unusual wind and weather conditions." *Id.*

In any event, regardless of the merits of petitioner's interpretation of the FRA's regulation, petitioner did not present its deference argument to the Ohio courts, and it cannot obtain this Court's review by presenting that argument for the first time here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* V. *MCBRIDE*, NO. 10-235	3
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES REGARDING THE DEFERENCE OWED TO AN AGENCY'S INTERPRETATION OF ITS REGULATION	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

	Page
Auer v. *Robbins*, 519 U.S. 452 (1997)	8
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)	7
CSX Transp., Inc. v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2011)	1, 10
Gardebring v. *Jenkins*, 485 U.S. 415 (1988)	8
Lawrence ex rel. Lawrence v. *Chater*, 516 U.S. 163 (1996)	6
Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007)	8
McBride v. *CSX Transp., Inc.*, 598 F.3d 388 (7th Cir.), *cert. granted*, 131 S. Ct. 644 (2010)	5
Norfolk S. Ry. v. *Sorrell*, 549 U.S. 158 (2007)	5
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994)	9

REGULATION

49 C.F.R. § 229.43	2, 6

REPLY BRIEF

Petitioner Grand Trunk Western Railroad Company ("GTW" or "Petitioner") submits this Reply in support of its petition for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

In the Petition ("Pet."), GTW showed that the decision below presents the same issue of the proper standard for causation under the Federal Employers' Liability Act ("FELA") currently before the Court in *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010) (argued Mar. 28, 2011). Pet. 2-3, 14, 15-17. Petitioner thus requested that the petition be held pending this Court's resolution of *McBride*. Pet. i, 14. Second, GTW showed that the petition also should be granted because the imposition of liability in this case under FELA and the Locomotive Inspection Act ("LIA") was inconsistent with this Court's decisions highlighting the deference properly accorded to a federal agency's interpretation of its own regulations, and that the failure to accord deference imposes a virtually impossible standard for railroads to defend. *Id.* at 17-20. The Opposition ("Opp.") does not undermine these conclusions.

On the first issue, Respondent argues that "the petition should not be held pending *McBride* and instead should be denied" because Petitioner "did not preserve the claim that proximate causation is an element of a FELA claim." Opp. 11. That is wrong. Petitioner expressly challenged the causation instruction given to the jury and requested that the jury be instructed pursuant to the specific language of FELA. Trial Transcript ("Tr.") 1260-61. Petitioner renewed that challenge in the court of appeals because the instruction given by the trial court

misstated the proper standard for causation under FELA. Petitioner argued:

> The common law proximate cause standard dictates that the jury be instructed to determine whether the railroad's negligence caused the plaintiff's injury in whole or in part, i.e., that it was a proximate cause of the injury. An instruction which relaxes this standard with words such as "however slight," "no matter how slight" or "even the slightest" is patently wrong and flies in the face of United States Supreme Court and federal precedent.

Pet. Appellate Br. 24, App. No. 92711; *id.* at 23-24 (citing cases). Respondent made no claim that any aspect of this argument had been forfeited. The Ohio court of appeals, relying upon this Court's decision in *Rogers*, rejected Petitioner's claim on the merits. Pet. App. 16a-17a. There has been no forfeiture. This case properly presents the same question as *McBride*: What is the standard for causation under FELA. This case should be held for *McBride*.

As to the second issue, Respondent argues both that the issue is not presented and is not worthy of this Court's consideration because, among other things, this Court reaffirmed the "standard for judicial deference to an agency's interpretation of its own regulation . . . less than three months ago." Opp. 3 (citing *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871 (2011)). Respondent's arguments should be rejected. Below, petitioner presented detailed evidence of the Federal Railway Administration's (FRA) interpretation of Section 229.43 and argued to the Ohio Court of Appeals that, under that agency interpretation, Respondent could not base liability on evidence that exhaust fumes had entered into the cab to support a claim under 49 C.F.R. § 229.43. The

court of appeals never addressed the FRA's interpretation, and its refusal to do so is contrary to this Court's cases explaining that deference is warranted under these circumstances. That conflict, in turn, implicates an issue of critical importance to the railroad industry as explained in the amicus brief submitted by the Association of American Railroads. Depending on how the Court decides *McBride*, it either should vacate and remand the judgment in this case or grant the petition and decide both questions on the merits.

I. THIS CASE SHOULD BE HELD PENDING RESOLUTION OF *CSX TRANSPORTATION, INC.* V. *MCBRIDE*, NO. 10-235.

Respondent argues that Petitioner "should not be permitted to seek any benefit from this Court's decision in *McBride*" because he contends that petitioner did not "preserve in the Ohio courts the argument that 'proximate cause' is an element of a FELA claim." Opp. 2. Respondent is simply wrong.

First, Petitioner objected to the trial court's proposed causation instruction because it did not accurately set forth the appropriate substantive standard for causation under FELA. Tr. 1260-61 (requesting that the jury be "charged in the language of the statute"). Thereafter, relying upon the decision in *Sorrell*, Petitioner objected to the "in the slightest" language "enunciated in the *Rogers* case" and requested that the jury be instructed in accord with the language of FELA on the issue of causation. Tr. 1260-61, 1282-84 (citing *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957)). The trial court overruled that objection.[1]

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[1] As respondent acknowledges, Opp. 7 n.5, Petitioner proposed an instruction that required the jury to determine whether its

In its post-trial motion, Petitioner argued that the trial court had not followed *Sorrell* and the "traditional common law notions of proximate cause," and instead "improperly quantified the degree of causation under" FELA by "us[ing] the phrase 'however slight' or 'in the slightest' in the jury charge." Deft Grand Trunk W. R.R. Inc.'s Mot. for Judgment Notwithstanding the Verdict or New Trial at 13-15, No. 558055 (Ohio Ct. of Common Pleas filed Nov. 21, 2008). Respondent opposed Petitioner's argument, but never suggested that this argument had been forfeited or waived.

On appeal, Petitioner again relied on *Sorrell*, again showed that *Rogers* was not controlling, and again made clear that the proper standard under FELA was proximate causation. *See* Pet. Appellate Br. 20-25 (14 references to proximate causation); Pet. Appellate Reply Br. 4-6 (11 references to proximate causation). Specifically, as noted above, Petitioner argued that the trial court's inclusion of "words such as 'however slight,' 'no matter how slight' or 'even the slightest' is patently wrong and flies in the face of United States Supreme Court and federal precedent" because it "relaxes" the "common law proximate cause standard." Pet. Appellate Br. 24. Petitioner further argued that "[s]ince the inception of the FELA, a plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's injury. There is no relaxed causation standard or the 'in the slightest' standard as urged by [Respondent] and erroneously adopted by the trial court." *Id.* at 23.

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conduct was a "proximate cause" of respondent's injuries and objected to the instruction given.

Respondent acknowledges, in a footnote, Opp. 10 n.6, that Petitioner made these arguments in the court of appeals. In the court of appeals, Respondent raised no claim of forfeiture or waiver. Instead, Respondent argued solely on the merits that "[t]he correct standard of causation was given in the instant matter and the trial court properly charged the jury." Resp. Appellate Br. 27. Relying on Justice Ginsburg's concurring opinion in *Sorrell*, respondent argued that "'the causation standard in FELA actions is more "relaxed" than in tort litigation generally.'" *Id.* Indeed, the principal case on which Respondent relied equated the rejection of proximate causation under FELA with *Rogers*' adoption of the "even the slightest" language. *See id.* (quoting *Blankenship* v. *CSX Transp., Inc.*, 1993 Ohio App. LEXIS 3521, at *11-12 (Ohio Ct. App. July 15, 1993)). The Ohio court of appeals addressed these arguments on the merits and ruled that the trial court's causation instruction was appropriate under this Court's decision in *Rogers*. Pet. App. 17a. There was no forfeiture in this case.

To the contrary, just as in this case, the petitioner in *McBride* objected to the analogous "no matter how small" formulation used in its causation instruction. *See* Brief for Petitioner at 7-10, *CSX Transp., Inc.* v. *McBride*, No. 10-235 (U.S. filed Jan. 13, 2011) (citing *Rogers*). And, as was the case here, petitioner in *McBride* challenged the *Rogers* formulation because it unduly relaxes the standard for causation under FELA. The question whether Congress preserved common-law proximate causation, as indicated by three Justices in *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 172-74 (2007) (Souter, J., concurring), or adopted a more relaxed causation standard, as held by the Seventh Circuit, *McBride* v. *CSX Transp., Inc.*, 598

F.3d 388 (7th Cir. 2010), is the question presented to this Court in *McBride*. There is every indication that this Court's decision in *McBride* will be an "'intervening factor . . . that has a legal bearing upon the decision'" of the Ohio court of appeals. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (per curiam) (internal quotation marks omitted). This case should be held pending resolution of *McBride* and then be disposed of consistent with this Court's holding.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES REGARDING THE DEFERENCE OWED TO AN AGENCY'S INTERPRETATION OF ITS REGULATION.

Respondent advances a scatter-shot series of arguments opposing review of the second question presented. He contends that the issue of deference to an agency's interpretation was not "pressed or passed on below," Opp. 13, and that petitioner "identifies no *agency* interpretation to which deference could be given," *id.* at 14. He further contends that review is unwarranted because there is "no conflict among the federal courts of appeals or state supreme courts" *id.* at 14-15, and that resolution of this "issue in petitioner's favor would not affect the outcome of the case," *id.* at 15. Lastly, he argues that the FRA's interpretation is contrary to the language of the regulation. *Id.* at 16. These arguments do not withstand scrutiny.

First, the issue of deference to an agency's interpretation of its regulations was presented to the court of appeals. Petitioner expressly argued in the court of appeals that there was no violation of the LIA because the FRA has interpreted 49 C.F.R. § 229.43 to require (i) "evidence of a specific break or defect in the exhaust system," or (ii) evidence that

"the diesel exhaust entering the cab of a locomotive exceeds permissible standards set forth by OSHA." Pet. Appellate Br. 17. Based on that interpretation, petitioner argued to the court of appeals that "it is not a violation of [Section] 229.43 where the engine in service has no defect in the exhaust system and the engine stacks are the proper height but some diesel exhaust still enters the cab during normal operating procedures." *Id.* Petitioner argued that, measured by this legal interpretation, Respondent had failed to prove a violation of Section 229.43.

The court of appeals disregarded FRA's interpretation of Section 229.43, and instead held, based on the court's holding in a prior case, that Section 229.43 "'prohibits diesel exhaust from coming into the cab of the locomotive.'" Pet. App. 12a. Specifically, the court of appeals ruled that respondent had proven an LIA violation because "'the cab would get diesel exhaust in.'" *Id.* (citing *Hager* v. *Norfolk W. Ry.*, Cuyahoga App. No. 87553, 2006-Ohio-6580). The decision below adopts a legal interpretation that is contrary to that of the FRA. In turn, the approach adopted by the court of appeals is contrary to this Court's controlling precedent under which "the administrative interpretation" must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The decision below conflicts with this Court's precedent requiring courts to defer to administrative interpretations of regulations that are not inconsistent with the language of the regulation.

Second, deference to an agency interpretation is warranted in a wide variety of circumstances so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and

considered judgment on the matter in question." See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation set forth in a "legal brief"); see *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988) (same); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to "Advisory Memorandum" issued only to internal agency personnel). The court of appeals did not suggest that the testimony of Mr. English, the former Director of the FRA's Office of Safety Assurance and Compliance, did not accurately reflect the FRA's interpretation of what is required to establish a violation of Section 229.43. Nor could it, as Mr. English's testimony simply set forth the same standards embodied in FRA's official publications. AAR Amicus Br. 6-7 (the FRA's interpretation of Section 229.43 as reflected in FRA "Crashworthiness Report"). The court of appeals ignored this testimony reflecting FRA's interpretation of its own regulation. Instead, the court adopted its own independent view of the requirements of Section 229.43.

Third, the issue presented plainly is one of recurring national importance. As petitioner has shown previously, Pet. 17-18, the decision below conflicts with this Court's standards governing the deference due to an agency's interpretation of its regulations. Further, the proper interpretation of this regulation is of critical importance because the court's failure to defer to the FRA's interpretation of Section 229.43 will "have profound implications for the rail industry's fleet of over 24,000 locomotives." AAR Amicus Br. 9. Indeed, the court's independent interpretation of this regulation "without evidence of defective equipment or levels of exhaust exceeding OSHA threshold limits, potentially renders every

locomotive used by railroads in violation of federal law." *Id.*

Fourth, resolution of this issue would have a bearing on the judgment in this case. Respondent points to evidence in the record that "'under the circumstances described by [respondent] and Berger [his co-worker], a violation of the LIA occurred.'" Opp. 15 (alterations in original) (quoting Pet. App. 13a). At trial, respondent testified that the "circumstances" noted above – exhaust coming up through the floorboards – occurred only on locomotives with which he worked *after* he already had been diagnosed with COPD. Pet. 9 n.4. That is the condition to which the overwhelming majority of his damages were attributable. *Id.* at 11. As a result, the proper interpretation of Section 229.43 would make a significant difference in this case.

Finally, respondent's merits-based argument provides no warrant for denying review. Respondent argues that Section 229.43 "contains no language indicating that there must be a specific defect in the exhaust system or that the amount of exhaust fumes in the cab must exceed some threshold set by OSHA." Opp. 16. The controlling standard under this Court's cases is that deference is appropriate "unless" the interpretation "is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Here, FRA's interpretation of Section 229.43 is entirely consistent with the language of the regulation, and FRA's decision to limit liability to circumstances where, for example, diesel exhaust exceeds the levels considered hazardous by OSHA, is entirely appropriate.

The critical point, however, is that the court of appeals did not engage in that analysis or apply this Court's precedent governing the deference due to an

agency's interpretation. Instead, it adopted its own view of Section 229.43 even though that interpretation has profound implications for the fleet of diesel locomotives used across the country by the railroad industry. The petition should be granted because the decision below conflicts with this Court's decisions on a recurring matter of national importance.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be held pending resolution of *CSX Transportation, Inc.* v. *McBride*, No. 10-235 (U.S. granted Nov. 29, 2010), and then resolved in accord with the Court's decision in that case. Depending on the Court's decision in *McBride*, it either should vacate the judgment and remand the case or alternatively, grant the petition and hear the case on the merits.

Respectfully submitted,

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May 2, 2011

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No. 10-925

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Respondent.

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief as *amicus curiae*. Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to counsel for Respondent of AAR's intent to file a brief. Respondent has not provided consent.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, and the Locomotive Inspection Act (LIA), 49 U.S.C. §§20701-20703, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a federal negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year, thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources, expending hundreds of millions of dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

AAR's members are greatly concerned over the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of an important federal railroad safety regulation. The ruling that the regulation was violated if any diesel exhaust enters a locomotive cab, which was contrary to the FRA's interpretation of a rule that it promulgated and enforces, amounted to a finding that the defendant was negligent as a matter of law. This ruling has the potential greatly, and improperly, to expand FELA liability in a manner inconsistent with the views of the expert federal agency.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Moreover, AAR has had long-standing involvement with the subject of rail safety, and participates in all significant railroad safety rulemaking proceedings conducted by the FRA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members both in FELA litigation and in the field of safety regulation.

In its brief, AAR will show that the lower court's failure to defer to the FRA's interpretation of a federal railroad safety regulation on diesel exhaust has the potential to affect the outcome of many future FELA cases to the detriment of railroad defendants. Thus, as a trade association representing the nation's major railroads, AAR has an interest not only in assisting the Petitioner in obtaining relief from an erroneous decision, but also in assuring that an

important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THIS COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN *CSX TRANSP., INC. v. McBRIDE*	3
II. THE LOWER COURT'S FAILURE TO DEFER TO THE FEDERAL RAILROAD ADMINISTRATION'S INTERPRETATION OF ITS OWN SAFETY REGULATION HAS THE POTENTIAL FOR GREATLY AND IMPROPERLY EXPANDING FELA LIABILITY	3
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
Battaglia v. Consolidated Rail Corp., 2009 WL 3325903 (Ohio App. 6 Dist. 2009), *petition for cert.* filed July 13, 2010 (No. 10-75)	9
CSX Transp., Inc., v. McBride, 598 F.3d 388 (7th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-235)	2, 3
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)	3
Hawaii v. Mankichi, 190 U.S. 197 (1903)	7-8
Heydenfeldt v. Daney Gold and Silver Mining Co. 93 U.S. 634 (1876)	7
Lau Ow Bew v. United States, 144 U.S. 47 (1892)	8
Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926)	4
N.Y. Cent. R.R. v. Winfield, 244 U.S. 147 (1917)	3
Payne v. CSX Transp., Inc., No. 2-231-07 (Cir. Court for Knox Cty., TN)	10
Schoenwald v. Union Pac. R.R., Civ. No. 09098726 (Dist. Ct. for Salt Lake Cty. filed May 22, 2009)	10
Sorrells v. United States, 287 U.S. 435 (1932)	7
Taylor v. Union Pac. R.R., 2010 WL 2977142 (S.D. Ill. 2010)	7
Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)	8
United States v. Katz, 271 U.S. 354 (1926)	7

TABLE OF AUTHORITIES—Continued

	Page
United States v. Kirby, 7 Wall. 482, (1868)	7
United States v. Ryan, 284 U.S. 167 (1931)	7
Urie v. Thompson, 337 U.S. 163 (1949)	4
Wheeler v. Union Pac. R.R., No. 1022-CC11405 (Cir. Ct. of City of St. Louis filed Oct. 15, 2010)	10
STATUTES AND REGULATIONS	
45 U.S.C. §§51-60	2
45 U.S.C. §51	3
45 U.S.C. §53	3, 4, 9
49 U.S.C. §20103(a)	6
49 U.S.C. §20301 *et seq.*	4
49 U.S.C. §§ 20701(1)	8
49 U.S.C. §§ 20701-20703	4
Boiler Inspection Act, c. 103, 36 Stat. 913 (1911)	4
Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966)	5
Safety Appliances Act, c. 196, 27 Stat. 531 (1893)	4
49 C.F.R. §229.43	10
49 C.F.R. §229.43(a)	*passim*
49 C.F.R. §229.43(b)	7

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

	Page
Association of American Railroads, *Railroad Facts* (2010 ed.)	9
Federal Railroad Administration, Railroad Occupational Safety and Health Standards; Termination, Policy Statement, 43 Fed. Reg. 10584 (1978)	6
Federal Railroad Administration, Locomotive Crashworthiness and Cab Working Conditions, Report to Congress (1996)	6, 7
H.R Rep. No. 1386 (1908)	4, 9

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File a Brief which is filed along with this brief.

[1] Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because (1) it presents the same issue about the proper standard for proving causation under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, as *CSX Transp., Inc. v. McBride*, 598 F.3d 388 (7th Cir.), *cert. granted*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-235), and (2) the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of its own safety regulation will have profound implications for the rail industry and its locomotive fleet.

This *amicus* brief focuses on that second issue. Contrary to the ruling below that evidence of the presence of any diesel exhaust in a locomotive cab constitutes a violation of 49 C.F.R. §229.43(a), requiring a finding of negligence per se under FELA, the language of the regulation does not compel such a conclusion. Consistent with the regulation's language and intent, FRA's enforcement efforts under §229.43(a) have been directed at defects in a locomotive exhaust system and the sufficiency of stack heights. In addition, FRA has stated that it utilizes the OSHA diesel exhaust thresholds—which are designed to provide a safe workplace for employees—to determine compliance with §229.43(a). This interpretation, which the court rejected, is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances.

ARGUMENT

I. THIS COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN *CSX TRANSP., INC. v. McBRIDE*

AAR agrees with Petitioner that given this Court's grant of certiorari in *CSX Transp., Inc. v. McBride*, the Court, at minimum, should hold this case pending a decision in *McBride*.

II. THE LOWER COURT'S FAILURE TO DEFER TO THE FEDERAL RAILROAD ADMINISTRATION'S INTERPRETATION OF ITS OWN SAFETY REGULATION HAS THE POTENTIAL FOR GREATLY AND IMPROPERLY EXPANDING FELA LIABILITY

FELA provides the exclusive remedy for railroad employees who are injured in the course of their employment. *N.Y. Cent. R.R. v. Winfield*, 244 U.S. 147 (1917). Unlike the workers' compensation systems that cover virtually all other employees in the United States, FELA is a fault-based statute, under which rail employees are entitled to compensation only if they can prove that employer negligence caused their injury. 45 U.S.C. §51; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (FELA "does not make the employer the insurer of the safety of his employees while they are on duty."). Moreover, though FELA abrogated the traditional contributory negligence doctrine under which any negligence by the plaintiff barred recovery, if the employee's negligence is the cause, in part, of the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53. Thus, it was Congress' intent that FELA "makes each party responsible for his own

negligence and requires each to bear the burden thereof." H.R Rep. No. 1386, at 1 (1908).

During the era when FELA was enacted, Congress also passed several railroad safety statutes, among them the Safety Appliances Act, c. 196, 27 Stat. 531 (1893) (now codified at 49 U.S.C. § 20301, *et seq.*), which regulates freight car components, and the Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (now known as the Locomotive Inspection Act (LIA), and codified as amended at 49 U.S.C. §§ 20701-20703), which regulates every aspect of locomotives. *See Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). These safety statutes do not confer an independent right of action on injured employees, but have come to be viewed substantively, if not in form, as amendments to FELA. Violation of these statutes constitutes negligence as a matter of law in FELA cases. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). Moreover, as an exception to the general rule that each party should bear the consequences of its own negligence, a railroad's violation of a safety statute such as the LIA renders any employee's contributory negligence irrelevant, 45 U.S.C. §53, a feature of FELA that had a substantial impact on the outcome of this case.

In this case, plaintiff was able to avoid the consequences of his substantial contributory negligence by arguing that his injuries were caused by the railroad's violation of 49 C.F.R. §229.43(a), a regulation adopted by the FRA pursuant to its authority under the LIA.[2] Section 229.43(a) states, in relevant part, that

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[2] Authority to promulgate railroad safety regulations was initially delegated to the Interstate Commerce Commission. In

> [p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Section 229.43(a) contains two operative sentences. The first requires that products of combustion be released outside the cab: it does not demand that absolutely no exhaust ever enter the cab once it has been released outside the locomotive. The second sentence is directed at the design of exhaust stacks, requiring that they be high enough to prevent entry of exhaust into the cab under usual operating conditions.

In a ruling affirmed by the Ohio Court of Appeals, the trial court denied Petitioner's motion for a judgment notwithstanding the verdict (JONV), sustaining the jury's finding that §229.43(a), and thus, the LIA, was violated, despite the lack of evidence that the exhaust systems of the locomotives operated by plaintiff were defective, or that plaintiff was exposed to a dangerous level of diesel exhaust. Pet. App. at 10a-14a and 32a-33a. In the absence of such evidence, the jury's finding apparently rested on plaintiff's testimony that some diesel exhaust entered the locomotive cab and the plaintiff's expert's opinion that this constituted a violation of the FRA regulation. Pet. App. at 12a. Seemingly without consideration of the contrary view held by FRA, the court below concluded that the evidence was sufficient to

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1966, it was transferred to the newly formed Department of Transportation and delegated to FRA. Department of Transportation Act, Pub. L. No. 89-670, §6(c), 80 Stat. 931 (1966).

support a finding of a violation of the regulation, without a determination of whether the locomotive exhaust systems were in compliance with the regulatory requirement or whether the stacks of the locomotives plaintiff operated were deficient in that regard.

Thus, this case raises the issue of the proper interpretation of 49 C.F.R. §229.43(a), and a court's obligation to defer to the views of the federal agency which promulgated the regulation and is charged with its enforcement. When confronted with the issue of whether a safety regulation has been violated, courts must focus on the language, purpose and intent of the regulation. The Secretary of Transportation has plenary power to promulgate regulations "for every area of railroad safety," 49 U.S.C. §20103(a), authority which is exercised by the FRA. As a general matter, in promulgating rail safety regulations, it is not FRA's intent to impose near-impossible obligations on railroads that serve no genuine safety-related purpose. *See* Federal Railroad Administration, Railroad Occupational Safety and Health Standards; Termination, Policy Statement, 43 Fed. Reg. 10584, 10586 (1978) (FRA "must decide what regulations are necessary and feasible.").

Consistent with that approach, when applying §229.43(a), FRA has stated that its focus is on defects (e.g., leaks) in the locomotive exhaust system and the sufficiency of stack heights. Federal Railroad Administration, Locomotive Crashworthiness and Cab Working Conditions, Report to Congress, ch. 7, p.7-1 (1996) (Crashworthiness Report). FRA further explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act," *id.* at 7-2, indicating that the purpose of

§229.43(a) is to protect employees from harmful levels of diesel exhaust, not to assure they work in a pristine environment. FRA's intention expressed in the Crashworthiness Report is in accord with the testimony of Petitioner's expert, the former Director of FRA's Office of Safety Assurance and Compliance. Pet. at 7.[3]

The lower court's approach to interpreting the regulation, without consideration of the evidence of the regulatory intent, was at odds with the fundamental tenets of statutory interpretation, which calls for construing statutes in a way that is consistent with their overall purpose and structure. *See Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 638-39 (1876). This Court has repeatedly explained that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *Sorrells v. United States*, 287 U.S. 435, 447 (1932) (quoting *United States v. Kirby*, 7 Wall. 482, 486-87 (1868)); *United States v. Ryan*, 284 U.S. 167, 175 (1931); *United States v. Katz*, 271 U.S. 354, 357 (1926); *See also Hawaii v. Mankichi*, 190

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[3] In contrast to the court below, a District Court in Illinois did consider FRA's views when interpreting subsection (b) of §229.43, which prohibits the excessive gassing of batteries. In reliance on FRA's views expressed in the Crashworthiness Report, the court denied the plaintiff's summary judgment motion because there was a dispute of fact over whether the OSHA permissible exposure limit was exceeded, noting that "FRA measures excessive gassing of locomotive batteries using the permissible exposure limit ('PEL') developed by" OSHA. *Taylor v. Union Pac. R.R.*, 2010 WL 2977142 at *2 (S.D. Ill. 2010).

U.S. 197, 214 (1903) ("'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'" (quoting *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892)).

These same principles apply with even greater force to the FRA's interpretations of regulations that it has promulgated. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation"). Nonetheless, as Petitioner points out, the court below gave no weight or deference to FRA's interpretation of its regulation. *See* Pet. at 17-18. That interpretation is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances. While FRA's stated policy recognizes that it would be virtually impossible for locomotive cabs to be perfectly sealed and airtight, its interpretation of the diesel exhaust regulation is fully consistent with the LIA's requirement that locomotives be "in proper condition and safe to operate *without unnecessary danger of personal injury*." 49 U.S.C. §20701(1). (emphasis supplied) Yet the lower court refused to follow the FRA's less rigid, and more reasonable, reading of the regulation, even though the FRA is the agency which promulgated the regulation and which is charged by Congress with its enforcement.

As this case starkly demonstrates, whether a violation has occurred can significantly affect the outcome of a FELA case. The jury found the plaintiff was more than 80 percent responsible for causing both sets of the injuries for which he sought and was

awarded compensation. Pet. App. at 15a, n. 3. But for the finding of an LIA violation, plaintiff's damages award of $872,756, and Petitioner's liability, would have been reduced by plaintiff's percentage of fault, reducing the judgment by many hundreds of thousands of dollars. 45 U.S.C. §53. Thus, if FELA plaintiffs can convert the presence of any diesel exhaust in the cab into an LIA violation, they will no longer be "responsible for [their] own negligence" and "bear the burden thereof." H.R Rep. No. 1386, at 1.

Review of the decision below is crucial because the lower court's failure to defer to the FRA's interpretation of its own regulation will have profound implications for the rail industry's fleet of over 24,000 locomotives.[4] A conclusion that the presence of any diesel exhaust in a locomotive cab, without evidence of defective equipment or levels of exhaust exceeding OSHA threshold limits, potentially renders every locomotive used by railroads in violation of federal law. In another recent decision by an Ohio appellate court which reached a similar conclusion regarding §229.43(a), a plaintiff testified that he was "continuously exposed to diesel exhaust" during his entire career with the railroad, suggesting that virtually every one of the locomotives he had operated violated the regulation. *Battaglia v. Consolidated Rail Corp.*, 2009 WL 3325903 at *1 (Ohio App. 6 Dist. 2009), *petition for cert. filed* July 13, 2010 (No. 10-75). However, FRA, the agency that monitors railroad compliance with safety regulations, has never found such mass violations of §229.43(a).

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[4] *See* Association of American Railroads, *Railroad Facts* 49 (2010 ed.).

FELA suits which include claims of LIA violations similar to the claim asserted by Respondent are not uncommon. Indeed, outcomes like that reached in this case are likely to be repeated. AAR member railroads report they currently face numerous FELA suits in which plaintiffs allege that the presence of diesel exhaust in the locomotive cabs in which they rode constituted a violation of the LIA; over 200 such cases are pending in several northeastern states alone. Other railroads report additional such cases are being filed in other jurisdictions with some regularity. *See e.g.,* Complaint in *Schoenwald v. Union Pac. R.R.*, Civ. No. 09098726 (Dist. Ct. for Salt Lake Cty. filed May 22, 2009) (alleging violation of 49 C.F.R. Part 229.43 "by allowing diesel exhaust fumes to enter into and remain in locomotive cabs"); Complaint in *Wheeler v. Union Pac. R.R.*, No. 1022-CC11405 (Cir. Ct. of City of St. Louis filed Oct. 15, 2010) (alleging, among other things, exposure to diesel fumes and exhaust in violation of 49 C.F.R. 229.43); *see also Payne v. CSX Transp., Inc.*, No. 2-231-07 (Cir. Court for Knox Cty., TN) Motions Argument, pp. 67-69, 74 (Sept. 30, 2009).[5]

If this theory of liability is adopted, as it was by the court below, it would transform FELA by obviating the need for plaintiffs to prove negligent conduct by the railroad and render irrelevant any contributory negligence by the plaintiff. Because the lower court failed to offer a reasoned analysis of how §229.43(a) is

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[5] In the *Payne* case, the judge noted that the implication of the plaintiff's argument was that every locomotive built over the past 50 years would violate the Locomotive Inspection Act. Motions at the Close of Proof, p. 33, Nov. 29, 2010. Interestingly, the plaintiff in *Payne* cited to this case as precedent for his position. *Id.* at 47.

to be interpreted, and given the potential impact that a violation of this regulation can have on the outcome of a FELA case, this Court should grant the petition and provide guidance to lower courts on the need to give proper deference to FRA's interpretation of 49 C.F.R. §229.43(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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